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IN THE

Supreme Court of the United States

October Term, 1990

MAKAH INDIAN TRIBE,

Petitioner,

v.

THE UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

The courts below refused to allow an Indian tribe to intervene to protect its treaty fishing rights in on-going litigation over the management and allocation of anadromous fisheries. The questions presented are:

1. Does Fed. R. Civ. P. 24(a) require consideration of the interests of an applicant for intervention in determining whether a motion to intervene is timely, in accordance with decisions in the First, Second, Fifth, Seventh, Eleventh and D.C. Circuits, or may the applicant's interests be disregarded in determining timeliness, in accordance with decisions in the Third, Fourth, Sixth and Eighth Circuits, and by the Ninth Circuit here?

2. Is the applicant's alleged delay in seeking intervention relevant to timeliness under Rule 24(a) without regard to whether and to what extent such delay prejudiced the

existing parties to the case?

3. In light of this Court's decision in Martin v. Wilks, 490 U.S. 755 (1989), in a case involving extensive on-going judicial oversight of a continuous governmental activity, is a Rule 24(a) motion to intervene to participate in future proceedings, made on the condition that the applicant for intervention will not relitigate previously decided matters, untimely because of the applicant's prior failure to intervene?

PARTIES TO NINTH CIRCUIT PROCEEDINGS

A. The Makah Indian Tribe, applicant for intervention in the district court, was the **appellant** in the Ninth Circuit.

B. The following parties opposed Makah's motion to intervene in the district court and were **respondents** in Makah's appeal to the Ninth Circuit:

Plaintiff:	The United States of America
Plaintiff-Intervenors:	Confederated Tribe and Bands of the Yakima Indian Nation, Confederated Tribes of the Warm Springs Reservation of Oregon, Confederated Tribes of the Umatilla Indian Reservation, Nez Perce Tribe
Defendant:	State of Oregon
Defendant-Intervenor:	State of Washington

C. The following parties did not oppose Makah's motion to intervene in the district court or in the Ninth Circuit:

Plaintiff-Intervenor:	Shoshone-Bannock Tribes
Defendant-Intervenor:	State of Idaho

D. The Confederated Tribes and Bands of the Colville Indian Reservation intervened in the case after the district court denied Makah's motion to intervene. Colville was not a party to the Ninth Circuit proceedings.

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7A Wright & Miller, Federal Practice and Procedure: Civil, § 1901 (1972) 24-25, 40-41

OPINIONS BELOW

The opinion of the Ninth Circuit is reported at 913 F.2d 576 and is reprinted in Appendix A. The opinion of the District Court for the District of Oregon is reported at 122 F.R.D. 571 and is reprinted in Appendix C.

JURISDICTION

The Ninth Circuit's opinion was filed and judgment was entered on August 27, 1990. The Ninth Circuit entered an order denying the Makah Tribe's timely petition for rehearing on January 11, 1991. This Court has jurisdiction to review the Ninth Circuit's judgment by writ of certiorari under 28 U.S.C. § 1254.

RULE INVOLVED IN THE CASE

Federal Rule of Civil Procedure 24(a):

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant

> claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

STATEMENT OF THE CASE

A. The Makah Tribe's Treaty Fishing Rights.

For thousands of years the Makah Indian Tribe has occupied coastal lands at the northwest corner of the continental United States. With the Pacific Ocean to the west and the Strait of Juan de Fuca to the north (see App. E-1), the Makahs enjoyed unique access to abundant marine resources. In United States v. Washington, 384 F. Supp. 312, 363 (W.D. Wash. 1974),[1] Judge Boldt

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[1] Aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), enforced, 459 F. Supp. 1020 (W.D. Wash. 1977), aff'd sub nom. Puget Sound Gillnetters v. United States District Court, 573 F.2d 1123 (9th Cir. 1978), substantially upheld sub nom. Washington v. Passenger

found:

> [T]he Makah Indians, prior to treaty times, were primarily a seafaring people who spent their lives either on the water or close to the shore. Most of their subsistence came from the sea where they fished for salmon, halibut and other fish, and hunted for whale and seal.

More than any other northwest tribe, Makah was oriented to the ocean; when Governor Stevens approached the Makahs to negotiate a treaty, their primary concern was ocean fishing and hunting. Id. The Tribe's customary salmon fishing grounds extended 40 miles out to sea in the Pacific Ocean. United States v. Washington, 730 F.2d 1314, 1318 (9th Cir. 1984). In Washington v. Passenger Fishing Vessel Ass'n, this Court particularly noted that the "Makah Tribe 'maintained from time immemorial a thriving economy based on commerce' in 'marine resources.'" 443 U.S.

Fishing Vessel Ass'n, 443 U.S. 658 (1979).

658, 665 n.7 (1979).

The Tribe's economic and cultural existence remains dependent on ocean fisheries today. On the remote Makah Indian Reservation, fishing is the principal source of employment for tribal families. Salmon is essential to the cultural and social life of the Tribe. See United States v. Washington, 384 F. Supp. at 365.

In United States v. Washington, Judge Boldt held that the Stevens treaties secured the Indians' right to take up to 50 percent of the harvestable fish that pass through their customary fishing places. Id. at 343, 406. This holding was substantially affirmed in Passenger Fishing Vessel Ass'n. This Court held that "the purpose and language of the treaties are unambiguous; they secure the Indians' right to a share of each run of fish that passes through tribal fishing areas." 443 U.S. at 679. It

further held "that an equitable measure of the common right should initially divide the harvestable portion of each run that passes through a 'usual and accustomed' place into approximately equal treaty and non-treaty shares . . . ." Id. at 685. In allocating treaty and non-treaty shares, the location of the harvest and the governmental body with jurisdiction over it is irrelevant: "Shares in the fish runs should not be affected by the place where the fish are taken." Id. at 687.

B. Columbia River Salmon.

Salmon are produced in substantial numbers in the Columbia River system. They migrate downstream to the Pacific Ocean, where they spend the majority of their adult lives. Near the end of their life cycle, the migration is reversed; they return to the Columbia River and migrate upstream toward the waters of their origin. Idaho ex

rel. Evans v. Oregon, 440 U.S. 380, 382 (1980) (Idaho I).

This migratory pattern brings Columbia River salmon within Makah's historic (and treaty-secured) ocean fisheries. As these salmon pass along the Washington coast on their return migration to the Columbia River, they provide the foundation for the Makahs' critical spring and summer fisheries.

C. United States v. Oregon.

Within the 3-mile limit of the coast, and throughout their in-river migration, Columbia River salmon traditionally have been the subject of state regulation. In 1918, with the consent of Congress, Oregon and Washington entered into the Columbia River Fish Compact. Pub. L. 64-123, 40 Stat. 515 (1918). Under the Compact the two states annually determined appropriate escapement levels and permissible harvests.

See Idaho I, 444 U.S. at 383-85.

In 1968, the United States commenced this case against the State of Oregon to define the treaty fishing rights of four Indian tribes in the Columbia River or its tributaries[2] and the extent to which Oregon could regulate such rights.[3] The four tribes intervened. Makah did not do so because it does not fish within the Columbia River basin and its fisheries are not regulated by Oregon.[4]

The case was analogous to a proceeding in rem:

The original action, by seeking a

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[2] The four tribes, referred to as the Columbia River tribes, are Yakima, Nez Perce, Umatilla and Warm Springs. See App. E-1 for locations of their reservations.

[3] The district court has continuing jurisdiction under 28 U.S.C. §§ 1331, 1345.

[4] Makah was one of the original intervening tribes in United States v. Washington, parallel litigation involving Washington's regulation of fisheries. See part A above.

> declaration of treaty fishing rights, sought to apportion the Columbia River anadromous fishery among competing sovereigns. It thus has been recognized as analogous to an equitable action in rem.

United States v. Oregon, 657 F.2d 1009, 1015 (9th Cir. 1981) (Kennedy, J.). Judgment was entered in 1969 establishing standards for Oregon's regulation of fisheries in the Columbia River. Sohappy v. Smith, 302 F.Supp. 899 (D. Or. 1969).[5] The district court retained continuing jurisdiction to enforce its decree and resolve disputes among the parties. Id. at 911.

Over the ensuing 22 years, this action has become the forum for in-river management and allocation of Columbia River fisheries -- either through contested court proceedings or agreements among the parties that are

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[5] Sohappy was filed by individual members of the Yakima Indian Nation. It was consolidated with this action in 1969, but severed in 1977. United States v. Oregon, 657 F.2d at 1011 n.1.

presented to and adopted by the court.[6] In its opinion below, the Ninth Circuit explained:

> United States v. Oregon became the forum for allocating the harvest of fish that enter the Columbia River system. . . . The fishery is directly regulated by the states of Washington and Oregon under the 1918 Columbia River Compact. Harvest quotas are set by the compact states after negotiations with the other parties and adopted with court approval.

913 F.2d at 579 (App. A-4-5) (footnote omitted) (emphasis added).

Idaho was allowed to intervene in 1984. United States v. Oregon, 745 F.2d 550 (9th Cir. 1984). Two other tribes in the Columbia River basin intervened later: Shoshone-Bannock in 1986 and Colville in 1989. See App. E-1 for the locations of their reservations. For the reasons that

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[6] See United States v. Oregon, 718 F.2d 299, 302 (9th Cir. 1983) (particular appeal "is but part of extensive ongoing judicial oversight of a continuous activity").

follow, Makah moved to intervene in 1988, but its motion was denied.

D. Federal Ocean Fisheries Management.

In 1976, Congress asserted Federal management authority over ocean fisheries in a zone extending from the seaward boundary of each coastal state to a distance of 200 miles out to sea. Fishery Conservation and Management Act of 1976 ("Magnuson Act"), 16 U.S.C. § 1811. The Pacific Fishery Management Council ["PFMC"], is responsible for preparing proposed fishery management plans and implementing regulations for ocean fisheries seaward of Washington, Oregon and California.[7] 16 U.S.C. §§ 1852(a)(6), 1853 (a)-(c). The plans and regulations do not

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[7] The PFMC is comprised of the principal State official with marine fishery management responsibility from Washington, Oregon, California and Idaho, the Regional Administrator of the National Marine Fisheries Service, and 8 members appointed by the Secretary of Commerce. 16 U.S.C. § 1852(a)(6), (b)(1) and (2).

become effective until reviewed and adopted by the Secretary of Commerce. 16 U.S.C. §§ 1854, 1855.

The PFMC and the Secretary did not restrict tribal ocean fisheries until 1984.[8] These fisheries[9] had been severely limited until United States v. Washington was decided, and were being gradually re-built in the early 1980's. In 1984, concerns over the impact of the tribes' ocean fisheries on salmon originating in the Columbia River and other systems led to the adoption of a quota limiting the total harvest in the treaty ocean fishery.

Makah became an active participant in the complicated, annual PFMC process. In 1986 and 1987, Makah filed suit under the

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[8] Before then, PFMC had adopted season and gear regulations proposed by the tribes.

[9] In addition to Makah, three other Washington coastal tribes have ocean fisheries.

judicial review provisions of the Magnuson Act (16 U.S.C. § 1855), in order to challenge the quotas imposed on ocean treaty fisheries.[10]

In October 1987, the United States moved to dismiss Makah's suit under Fed. R. Civ. P. 19, claiming that absent tribes, especially the Columbia River tribes, were indispensable parties who could not be joined due to their sovereign immunity. The United States argued that, since all tribes collectively are limited to 50 percent of the harvestable fish, any increase in the ocean treaty quota necessarily would require a reduction in the "in-river" harvest by the Columbia River tribes. The district court granted the United States' motion to dismiss

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[10] This approach had been used previously by Western Washington tribes to challenge the Secretary's ocean fishing regulations. See Hoh v. Baldridge, 522 F.Supp. 683 (W.D. Wash. 1981), aff'd, 676 F.2d 710 (9th Cir.), cert. denied, 459 U.S. 864 (1982).

in May 1988 and, as to Makah's challenge to the quota itself, the Ninth Circuit affirmed. Makah v. Verity, 910 F.2d 555, 559, 561 (9th Cir. 1990).[11]

E. The Effect of United States v. Oregon on Makah's Treaty Fishing Rights.

Until 1987, Makah did not appreciate the close relationship between this case (United States v. Oregon) and the ocean management process. However, from its participation in the 1987 PFMC process, and discovery in Makah v. Verity, it appeared to Makah that annual, confidential negotiations among the parties to this case, from which Makah is excluded because it is not a party, were having a major, if not determinative, effect on PFMC deliberations regarding the quota for ocean treaty fisheries.

For example, in recommending

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[11] The Ninth Circuit reversed and remanded with respect to certain procedural claims. Id.

Secretarial adoption of the PFMC's proposed regulations in 1987, the Regional Administrator of the National Marine Fisheries Service expressly relied on agreements which had been negotiated confidentially among the parties to this case, including federal and state fisheries officials who are voting members of the PFMC.[12] The Chairman of the PFMC, responding to Makah's request for an in-season chinook adjustment later in 1987, informed Makah of the effect of one such agreement on the quota for ocean treaty fisheries:

> As you [Makah] are well aware, earlier deliberations on your request for more chinook were affected by the fact that an overall ocean chinook quota was fixed in the 1987 Ocean and In-River Management Agreement signed by the [federal and state] agencies and Columbia River tribes.[13]

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[12] District Court Clerk's Record ("CR") No. 1508 (Exh. B at 6).

[13] Id. (Exh. D) (emphasis added).

The parties to this case continued to insist, however, that their annual, confidential negotiations did not affect the ocean management process. As late as February 9, 1988, the Oregon Department of Fish and Wildlife assured Makah that "[n]o negotiated agreements will be entered into without all affected parties having an opportunity to participate." This assurance came in an exchange of correspondence in which Makah strongly objected to its exclusion from negotiations regarding the allocation of fish runs in which it has an interest.[14]

F. Makah's Motion to Intervene.

Later in February 1988, Makah received notice that some of the parties to this case had agreed upon a ten-year framework management plan for Columbia River fisheries, which would establish the ground

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[14] CR No. 1509, Exhs. A-E.

rules for future annual negotiations. When Makah obtained a copy of the plan, it obtained, for the first time, clear evidence of the relationship between the in-river management process, which is the subject of this case, and the ocean management process, through which Makah's fisheries are regulated.

The parties to the proposed plan included the Secretary of Commerce, who has no in-river management authority. The plan noted that some ocean fisheries (including Indian treaty fisheries) impact Columbia River salmon runs, and contained provisions regarding regulation of such ocean fisheries.

For example, § II.I.5.C. required the Secretary of Commerce to adopt ocean chinook regulations (including quotas applicable to the Makah ocean treaty fishery) that "comply with the allocation and other requirements"

of the plan. Unlike other provisions, this one was binding notwithstanding applicable federal law, regulations, procedures or policies to the contrary (see § I.B.7). This provision and others would be implemented through annual negotiations over the life of the plan among the parties to this case (e.g. Part IV). The district court would retain continuing jurisdiction and resolve disputes among the parties (§ I.C.1).

On March 11, 1988, the United States, Oregon, Washington and the four Columbia River tribes moved for an order adopting the framework management plan as a decree of court. On March 31, 1988 (the deadline for responding to the motion), Makah moved to intervene and submitted a brief opposing the plan. The other two parties to the case, Idaho and Shoshone-Bannock, filed pleadings in opposition to the plan.

Makah sought intervention for two purposes: (1) to oppose adoption of the plan; and (2) to participate in future proceedings in the case, whether or not the plan was adopted.[15] Makah expressly agreed to be bound by the six conditions imposed on Idaho's intervention in a prior court order, including the condition that Makah would not attempt to relitigate matters previously decided.[16]

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[15] Makah's Complaint in Intervention asked that the Tribe be given "the same rights of participation in planning, decision making and management of Columbia River salmon stocks that pass through the Tribe's usual and accustomed grounds as is afforded any other party to this litigation." CR No. 1566 (Exh. C at 9). In its reply brief in the district court, Makah explained that "[a]s an intervenor, the Tribe properly seeks to participate in future proceedings that affect its fishery and its treaty rights," and contested the existing parties' efforts to exclude it from "measures to implement the Plan." CR No. 1566 (p. 1, 18).

[16] The plan's proponents did "not object to intervention by the Makah Indian Tribe for the limited purpose of presenting its objections to the [plan]." CR No. 1531

The district court denied Makah intervention for any purpose, including participation in future proceedings in the case, and approved the plan. It held that Makah had not satisfied any of the requirements under Rule 24(a)(2), including timeliness. 122 F.R.D. at 578-79 (App. C-35-36).

The court addressed Makah's concern that the plan required the Secretary of Commerce to adopt ocean regulations consistent with its terms, notwithstanding applicable law to the contrary, by restricting the application of the plan's ocean fisheries provisions. It held that these provisions could be implemented only as "recommendations" from the parties to

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(p. 1-2, 5); CR No. 1550 (p. 2, 3, 30). They did object to Makah participation in future proceedings in the case. CR No. 1550. The plan's opponents (Idaho and Shoshone-Bannock) did not object to Makah intervention for any purpose.

this case to the PFMC. 122 F.R.D. at 577 (App C-26). This restriction was specifically noted by the Ninth Circuit. See 913 F.2d at 587 (App. A-47) (the district court held that "the plan did not bind the federal officials who signed it").

However, the district court did not address Makah's concern that the annual negotiations among the parties to this case, including federal and state officials who are members of or otherwise work closely with the PFMC, have a large effect on the outcome of the PFMC process in practice. Thus, the court did not address Makah's concern that its inability to participate in those negotiations (the in-river phase of the management process for Columbia River salmon) as a practical matter impairs its ability to protect its treaty fishing rights in the PFMC process (the ocean phase of the same management process).

G. The Ninth Circuit's Opinion.

The Ninth Circuit affirmed the district court's order denying Makah intervention on the sole ground that Makah's motion to intervene was untimely.

> Because we affirm the district court's decision that the Makah's motion was not timely, we need not reach any of the remaining elements of the test set forth in Rule 24.

913 F.2d at 589 (App. A-57).

The court's analysis of Rule 24's timeliness requirement addressed three factors: the stage of the proceeding; prejudice to the existing parties; and the reason for and length of delay. Id. at 588-89 (App. A-48-57). The court gave no consideration to Makah's interests in the case, or to the extent to which Makah would be prejudiced if it were denied intervention. The interrelationship between in-river management in this case, and Makah's ocean fisheries, was not discussed.

Makah's inability to obtain judicial review of ocean harvest limits was not mentioned.

The court's holding rested heavily on Makah's failure to intervene sooner. In its analysis of the "stage of the proceeding," the court relied on its prior holdings that "waiting until after entry of a consent decree weighs heavily against intervention." 913 F.2d at 588 (App. A-49-50). Similarly, in its analysis of the "reason for and length of delay," the court relied on a Seventh Circuit holding that "[a] party seeking to intervene must act as soon as he 'knows or has reason to know that his interests might be adversely affected by the outcome of the litigation.'" Id. at 589 (App. A-55). The court held these principles were applicable even with respect to Makah's request to participate in future proceedings in this on-going litigation, on the condition that it would not relitigate

previously decided matters. Id. at 588 (App. A-51-52).

The only other factor considered by the court was prejudice to the existing parties. As to Makah's request to participate in future proceedings in this case -- the exclusive forum for in-river management of Columbia River salmon for years if not decades to come -- the court held only that the district court's reasoning, that such participation "could still upset the delicate balance the parties have achieved," was not an abuse of discretion. Id. at 589 (App. A-54). The court did not weigh this prejudice to the existing parties against the prejudice to Makah from a denial of intervention.

Makah filed a timely petition for rehearing asking the Ninth Circuit to reconsider its decision solely with respect to Makah's request that it be allowed to

participate in future proceedings in this case. Rehearing was denied. App. D. The questions presented here arise exclusively from this aspect of Makah's motion to intervene to participate in future proceedings; Makah does not ask the Court to address the denial of Makah intervention to oppose approval of the framework management plan.

ARGUMENT

A. Certiorari Should be Granted to Resolve the Circuit Conflict Over Whether the Interests of an Applicant for Intervention Must be Considered when Evaluating the Timeliness of a Rule 24(a) Motion to Intervene.

Rule 24(a) seeks to balance two important policies: protecting the interests of non-parties who are adversely affected by, yet unrepresented in, pending litigation; and furthering the interests of the existing parties and the court in efficient judicial administration. 7A Wright & Miller, Federal Practice and

Procedure: Civil, § 1901 (1972).[17]

> Throughout the history of the intervention doctrine, the traditional raison d'etre of intervention of right -- minimizing the injury to third parties caused by judicial processes -- has conflicted with court concern about prejudice to existing parties and impairment of orderly judicial processes. This central conflict . . . has become localized in the requirement of Rule 24(a)(2) that a party's application for intervention of right must be timely.

Note, The Timeliness Threat to Intervention of Right, 89 Yale L.J. 586, 591 (1980) (footnotes omitted) (emphasis added).

Under Rule 24(a)(2), an applicant for intervention must meet four requirements: the application must (1) be timely; (2) show an interest in the subject matter of the action; (3) show that the interest may be impaired by the disposition of the pending

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[17] 3B Moore's Federal Practice, ¶ 24.07[1] at 24-52 & n.17 (2d ed. 1990); Kennedy, Let's All Join In: Intervention Under Federal Rule 24, 57 Ky. L.J. 324, 329-38 (1969); McDonald v. E. J. Lavino, 430 F.2d 1065, 1074 (5th Cir. 1970).

action; and (4) show that the interest is not adequately represented by an existing party.

In NAACP v. New York, 413 U.S. 345, 369 (1973), this Court held that failure to satisfy the first factor -- a timely application -- can be dispositive. In order to preserve the fundamental balancing envisioned by Rule 24, six circuits require the district courts to consider the applicant's interests in the threshold timeliness analysis (as this Court did in NAACP).

However, five circuits, including the Ninth Circuit, do not. In these five circuits, courts may routinely deny intervention on timeliness grounds without ever considering the likely prejudice to the applicant. The Timeliness Threat, 89 Yale L.J. at 594-95. In this case, the Ninth Circuit itself affirmed the denial of

Makah's motion to intervene without considering Makah's interest in the proceeding or the likely prejudice to Makah from a denial of intervention.

1. Review by this Court is Necessary to Resolve the Conflict Among the Circuits.

The Ninth Circuit employs a three-part test to evaluate the timeliness of a motion to intervene under Rule 24(a): the stage of the proceedings, the prejudice to the existing parties, and the reason for and length of the delay. See, e.g., United States v. Oregon, 913 F.2d at 588 (App. A-46); Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir.), cert. denied, 439 U.S. 837 (1978). None of these factors addresses the applicant's interests in being permitted to intervene.

This three-part test originated in the Eighth Circuit. Nevilles v. EEOC, 511 F.2d

303, 305 (8th Cir. 1975).[18] It has been criticized elsewhere because it is too narrow. E.g. Culbreath v. Dukakis, 630 F.2d 15, 20 (1st Cir. 1980); Stotts v. Memphis Fire Dept., 679 F.2d 579, 591 n.4, 592 (6th Cir.) (Martin, J., dissenting), cert. denied, 459 U.S. 969 (1982).

In addition to the Eighth and Ninth Circuits, the Third,[19] Fourth[20] and Sixth[21] Circuits employ timeliness criteria that do

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[18] See also Jenkins by Agyei v. Missouri, 855 F.2d 1295, 1316 (8th Cir. 1988), aff'd in part and rev'd in part on other grounds sub nom. Missouri v. Jenkins, 109 L. Ed. 2d 31 (1990).

[19] See, e.g., Donovan v. United Steelworkers, 721 F.2d 126, 127 (3rd Cir. 1983), cert. denied, 467 U.S. 1252 (1984); Pennsylvania v. Rizzo, 530 F.2d 501, 506 (3rd Cir.), cert. denied, 426 U.S. 921 (1976).

[20] Gould v. Alleco, 883 F.2d 281, 286 (4th Cir. 1989), cert. denied, 107 L. Ed. 2d 953 (1990).

[21] See, e.g., Stotts v. Memphis Fire Dept., 679 F.2d 579, 582 (6th Cir.), cert. denied, 459 U.S. 969 (1982).

not require consideration of the applicant's interests. In a thoughtful dissenting opinion in Stotts v. Memphis Fire Dept., Judge Martin argued that one "factor a court must consider is whether the applicant will be harmed if he is not allowed to intervene." 679 F.2d at 592. In his view, the district court's analysis in that case was "fatally deficient" because it "failed to examine whether, and to what extent, appellants would be harmed should intervention be denied." Id. at 595.

Judge Martin's dissenting views reflect the law in the First,[22] Second,[23] Fifth,[24]

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[22] See, e.g., Fiandaca v. Cunningham, 827 F.2d 825, 834-35 (1st Cir. 1987); Culbreath v. Dukakis, 630 F.2d 15, 20 (1st Cir. 1980).

[23] See, e.g., Farmland Dairies v. New York State Dep't of Agric., 847 F.2d 1038, 1044 (2d Cir. 1988); United States v. New York, 820 F.2d 554, 557 (2d Cir. 1987).

[24] See, e.g., Stallworth v. Monsanto Co., 558 F.2d 257, 265-66, 267-68 (5th Cir. 1977).

Seventh,[25] Eleventh[26] and D.C. Circuits.[27] These circuits require balancing of the possible prejudice to the applicant resulting from a denial of intervention against the possible prejudice to existing parties resulting from a grant of intervention.

This court should grant certiorari to resolve this conflict among the circuits, which affects the threshold timeliness analysis in every motion to intervene in the federal courts.

2. Review by this Court is Necessary

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[25] See, e.g., City of Bloomington v. Westinghouse Elec. Corp., 824 F.2d 531, 534, 537 (7th Cir. 1987); United States v. Kemper Money Mkt. Fund, 704 F.2d 389, 391 (7th Cir. 1983).

[26] See, e.g., Walker v. Jim Dandy Co., 747 F.2d 1360, 1364 (11th Cir. 1984); United States v. Jefferson County, 720 F.2d 1511, 1516 (11th Cir. 1983).

[27] See, e.g., Natural Resources Defense Council v. Costle, 561 F.2d 904, 907 (D.C. Cir. 1977); Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. Cir. 1972).

to Safeguard the Essential Balancing of Interests Required by Rule 24(a).

This Court has considered the question of timeliness under Rule 24(a) on only two occasions. In both cases the Court considered the interests of the applicant in its timeliness analysis.[28]

In the first case, NAACP v. New York, 413 U.S. 345 (1973), the Court held that the point to which the suit has progressed is not dispositive. Id. at 365-66. Rather, "timeliness is to be determined from all the circumstances." Id. at 366. Among the circumstances considered by the Court in NAACP was whether a denial of intervention would likely prejudice the applicants. Id. at 368-69.

In the second case, United Airlines v. McDonald, 432 U.S. 385, 391-96 (1977), the

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[28] See also Arizona v. California, 460 U.S. 605, 615 (1983).

Court held that post-judgment intervention by unnamed class representatives for the purposes of appeal was timely, where the named plaintiffs had declined to press an appeal. As in NAACP, the interests of the applicants for intervention in "hav[ing] their day in court" figured prominently in the Court's analysis. See id. at 395-96 & n.16; see also Martin v. Wilks, 490 U.S. 755, 762 (1989) (noting "deep-rooted historical tradition that everyone should have his own day in court" in context of Rules 19 and 24).

Despite the instruction of NAACP to consider all the circumstances, district courts in the five circuits identified above may ignore the applicant's interests altogether in the timeliness analysis.

> This approach to intervention allows the trial court, as well as the appellate court, to avoid addressing the difficult but central issue posed by intervention of right: when should unrepresented and adversely affected

> nonparties be allowed to participate in litigation, despite some detriment to existing parties and some disruption of orderly court calendars? . . . Far from evolving principles to govern the timeliness of a motion to intervene as of right, the current practice is more likely to undermine the right itself.

The Timeliness Threat, 89 Yale L.J. at 596.

In order to safeguard the essential balancing of interests required by Rule 24(a), this Court should again consider the Rule's timeliness requirement. This is an appropriate case in which to do so, since the Ninth Circuit's timeliness analysis gave no consideration to Makah's interests whatsoever.

3. The Makah Tribe is Severely Prejudiced by the Denial of its Motion to Intervene.

If the Ninth Circuit had considered Makah's interests, it would have been clear that Makah is severely prejudiced from denial of intervention to participate in future proceedings in this case -- in particular, the annual negotiations,

agreements and/or court proceedings regarding management and allocation of Columbia River fisheries.

These proceedings affect the interests of the Makah Tribe in at least two ways. First, given the life cycle of salmon, in-river management in one year necessarily affects what will be available for ocean harvests in future years. In his opinion below (122 F.R.D. at 576; App. C-24), Judge Marsh recognized that:

> All stages of [the] migration cycle are necessary to the continued procreation of the anadromous fish. Therefore, by affecting one stage of the cycle, all stages are affected. The Makah Tribe, therefore can rightfully contend that decisions made concerning what will happen upstream from the mouth of the Columbia River may in some way affect them.[29]

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[29] Judge Marsh discounted this interest because he believed it was shared by too many other potential intervenors. However, Judge Marsh did not consider Makah's unique interests as an Indian tribe with treaty rights to the fish that are in the constructive possession of the district court. That interest is sufficient to

Second, there is a clear relationship between in-river and ocean management measures within a given year. In Makah v. Verity, 910 F.2d 555, 561 (9th Cir. 1990), the court held that "in-river" tribes (such as Columbia River tribes) are indispensable parties in a lawsuit seeking to raise the Federal quota for ocean treaty fisheries. The Ninth Circuit reasoned that, since all tribes collectively are limited to 50 percent of the harvestable fish, any increase in the ocean treaty harvest necessarily would require a reduction in the in-river treaty harvest, thereby adversely affecting the "in-river" tribes. Id. at 560.

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entitle Makah to participate along with the other six tribes who have been allowed to intervene. This is particularly true since Makah's interests in ocean fisheries are presently unrepresented by any party in the case. See Makah v. Verity, 910 F.2d at 560 (United States cannot represent tribes where they have conflicting interests).

Because of the collective limit on all treaty Indian harvests, the annual establishment in this case of allowable harvest levels for "in-river" tribes directly affects the permissible harvest levels for ocean fishing tribes. In Makah v. Verity, the Ninth Circuit explained:

> This action concerns ocean quotas that coordinate with the most recent Columbia River Fish Management Plan. The plan was negotiated by the parties to the Oregon suit and approved by the Oregon court in 1988. Although not a party to the Oregon suit [sic], the federal government participated in the negotiations and signed the plan. The plan sets minimum "escapement" levels for all Columbia River runs with quotas low enough to protect the weakest runs. For 1987, it assigned most of the allowable [treaty] catch of the weakest run to river fishermen, anticipating low ocean quotas.

910 F.2d at 557 (emphasis added) (footnote omitted).

In this case, an affiant for one of the Columbia River tribes explained that the annual management negotiations among the parties are intended to assure that ocean

fisheries are limited to a level deemed acceptable to them.[30] She stated the "primary purposes" of the annual negotiations, agreements and court orders

> are to commit regulatory agencies; the Secretary of Commerce with respect to ocean fisheries, and the states of Oregon and Washington . . . with respect to mainstem Columbia River commercial fisheries, to enact harvest management quotas or guidelines which assure sufficient salmon escape ocean fisheries to meet Columbia River biological and treaty Indian, and non-Indian fisheries needs.[31]

Since Makah is not a party in United States v. Oregon, it is unable to participate in these annual negotiations. However, Federal and state fisheries officials who are involved in the PFMC process, including voting members of the PFMC, do participate in the negotiations. Because the negotiations "coordinate" with and by design heavily influence the Federal

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[30] CR No. 1549 (p. 27).

[31] Id.

ocean management process, Makah's ability to protect its interests in the ocean management process is severely impaired. Moreover, since the Ninth Circuit held in Makah v. Verity that Makah cannot obtain judicial review of the substantive outcome of that process (namely, limitations on the Indian harvest in the ocean), the prejudice to Makah from its inability to participate in all phases of the process, including the United States v. Oregon negotiations, is magnified.[32]

The Ninth Circuit considered none of this. Its opinion does not address: (1) the injury Makah would suffer as a result of exclusion from the "forum for allocating the harvest of fish that enter the Columbia

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[32] The practical impairment of Makah's ability to protect its interests was never addressed by the district court, even though the Makah's inability to challenge the ocean regulations was brought to the court's attention. See 122 F.R.D. at 577 (App. C-29-31).

River system," United States v. Oregon, 913 F.2d at 579 (App. A-4); (2) whether other tribes and states actively competing for a share of the same resource could adequately represent Makah's interests, or whether the Tribe's interests could be adequately represented by federal regulators; (3) Makah's inability to obtain judicial review of ocean fishing regulations which "coordinate" with and are clearly influenced by the negotiations, agreements and court orders in this case,[33] and (4) whether denial of the Makah motion would serve to bar Makah permanently from participating in future proceedings allocating and managing

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[33] The Ninth Circuit's failure to consider this factor was particularly egregious since the same panel heard Makah's appeal in this case and in Makah v. Verity. The panel's decision in this case does not even acknowledge its prior decision in Verity (holding Makah is barred by Rule 19 from challenging ocean regulations due to Makah's inability to join the Columbia River tribes as parties), let alone consider it as a factor in its intervention analysis.

Columbia River fisheries.

The Ninth Circuit's failure to consider these matters was not the result of mere inadvertence, but flowed inexorably from the Ninth Circuit's three-part timeliness analysis, which excludes consideration of the applicant's interests. Absent Supreme Court action, numerous applicants in the Ninth Circuit and the other four circuits identified above will continue to be denied access to Article III courts as a result of a misapplication of Rule 24(a)'s timeliness requirement.

B. Certiorari Should Be Granted to Clarify the Relative Importance of (a) Prejudice to Existing Parties and (b) the Applicant's Delay, in the Timeliness Analysis under Rule 24(a).

Courts and commentators generally agree that delay in seeking intervention is significant under Rule 24(a) only to the extent it results in prejudice to the existing parties. 7A Wright and Miller,

Federal Practice and Procedure, § 1916 at 573-76.

> [T]he courts are in general agreement that an intervention of right under Rule 24(a) must be granted unless the petition to intervene would work a hardship on one of the original parties. . . . [K]eeping in mind that the privilege of intervention stems from a desire to protect the rights of unrepresented third parties, it becomes apparent that the timely application requirement under Rule 24 was not intended to punish an intervenor for not acting more promptly but rather was designed to insure that the original parties should not be prejudiced by the intervenor's failure to apply sooner.

Note, The Requirement of Timeliness Under Rule 24 of the Federal Rules of Civil Procedure, 37 Va. L. Rev. 863, 867 (1951).[34]

In this case, however, the Ninth Circuit relied almost entirely on Makah's failure to intervene sooner as the basis for

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[34] Rule 24's timeliness requirement has not been changed since the Note quoted in the text was written. The Note continues to be cited for its interpretation of that requirement. E.g. Garrity v. Gallen, 697 F.2d 452, 455 (1st Cir. 1983); McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1073 (5th Cir. 1970).

denying intervention. With respect to Makah's request that it be permitted to participate in future proceedings, in particular, the court gave only cursory treatment to the issue of prejudice to the existing parties. Moreover, it failed to consider whether the prejudice alleged resulted from the timing of Makah's motion to intervene.

The Ninth Circuit's undue emphasis on Makah's alleged delay conflicts with decisions of virtually every circuit court that has considered the timeliness issue. See Part B.1 below. This Court should grant certiorari to resolve this conflict, clarify the importance of prejudice to the existing parties in the Rule 24(a) timeliness analysis, and correct the Ninth Circuit's departure from accepted judicial practice.

1. The Ninth Circuit Opinion Departs from Generally Accepted Practice in Other Circuits.

This Court and most circuit courts which have considered the question have held that prejudice to the existing parties is the most important factor in the timeliness analysis. Accordingly, they have concluded that timeliness is no bar to intervention in future proceedings where litigation is on-going and where the applicant agrees not to relitigate settled issues. See Arizona v. California, 460 U.S. 605, 615 (1983) (permitting tribes to intervene 31 years after commencement of litigation).

For example, in Natural Resources Defense Council v. Costle, 561 F.2d 904, 907-08 (D.C. Cir. 1977), the D.C. Circuit allowed chemical manufacturers to intervene in the implementation and oversight of a settlement agreement that required EPA to promulgate regulations affecting toxic discharges. The court noted that the applicants sought to participate in an

"upcoming remedial phase of the litigation," not to relitigate previously settled issues. It concluded that intervention "to participate in the future administration" of the settlement agreement was timely because it "would not have prejudiced the existing parties." Id.[35] Accord: Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. Cir. 1972).

Similarly, in Fiandaca v. Cunningham,

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[35] The D.C. Circuit rejected the argument that intervention should be denied on the ground that the applicants could challenge any regulation adopted pursuant to the settlement agreement in a separate action. The court reasoned that "judicial review of regulations after promulgation may, 'as a practical matter' afford much less protection than the opportunity to participate in post-settlement proceedings that seek to ensure sustainable regulations in the first place." 561 F.2d at 909 (emphasis in original).

Under Makah v. Verity, Makah cannot obtain judicial review of the results of the in-river or ocean management processes. Thus, this is a more compelling case for permitting intervention in on-going proceedings that help to shape regulations before they are promulgated.

827 F.2d 825, 832-35 (1st Cir. 1987), the First Circuit permitted residents of a state mental hospital to intervene in the remedial phase of a lawsuit involving a challenge to prison conditions, because the existing parties were considering a settlement involving possible displacement of state mental patients. The court reasoned that allowing the applicants to intervene would not prejudice the existing parties because the applicants had "sought participation only to address the possible use of the [mental hospital] as a prison site." Id. at 834. Accordingly, the proposed intervention was not untimely despite the applicant's arguable delay in seeking intervention. Id.

In allowing post-judgment intervention by an insurer to assert its subrogation claim to the proceeds of a tort recovery, the Fifth Circuit also relied on the absence of prejudice to the existing parties:

> In the present case, since [the insurer's] proposed intervention was for the limited purpose of staking a claim to a portion of the proceeds rather than an attempt to litigate any pre-judgment issue, we are utterly unable to perceive any way in which any party could have been prejudiced by the timing of the motion.

McDonald v. E.J. Lavino Co., 430 F.2d 1065, 1073 (5th Cir. 1970). Accord: Janusziewicz v. Sun Shipbuilding & Dry Dock Co., 677 F.2d 286, 293 (3rd Cir. 1982); Dowell v. Board of Educ., 430 F.2d 865, 868 (10th Cir. 1970).

Unlike these other circuit courts, the Ninth Circuit decision here failed to consider the overriding importance of prejudice in its timeliness analysis. In discussing prejudice, neither the district court nor the court of appeals acknowledged that Makah explicitly agreed not to relitigate settled issues. Moreover, with respect to Makah's participation in future proceedings, neither the district court nor the court of appeals explained how the

alleged delay in Makah's intervention could result in actual prejudice to the existing parties.

The Ninth Circuit's entire analysis of this issue was limited to the following:

> The Makah also argue that limiting intervention for the purpose of future proceedings will not prejudice the parties' past efforts. The district court, however, reasoned that allowing intervention at this stage could still upset the delicate balance the parties have achieved, citing County of Orange, 799 F.2d at 538 ("[T]he possibility of this settlement unraveling is so prejudicial that to allow the [city] to intervene at this late date would be tantamount to disaster"). This conclusion was not an abuse of discretion.

913 F.2d at 589 (App. A-53-54). The district court's analysis, however, addressed only prejudice to the existing parties from permitting Makah to oppose approval of the negotiated ten-year management plan, not prejudice from permitting Makah to participate in future proceedings under the plan negotiated by the

existing parties and approved by the court.[36] If anything, the existing parties benefitted from the alleged delay, by being able to negotiate and obtain court approval of the management plan without Makah's involvement. Makah's participation in future, annual negotiations to implement the plan cannot now jeopardize the existance of the plan itself.

If the Ninth Circuit's holding is allowed to stand, the existing parties to

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[36] E.g., 122 F.R.D. at 575 (Makah participation "would require the parties to start negotiating all over again), 579 ("the delay would be in trying to reopen negotiations of the Plan") (App. C-20, 39). Moreover, County of Orange v Air California, 799 F.2d 535 (9th Cir. 1986), cert. denied, 480 U.S. 946 (1987), which the district court cited only in reference to the timeliness criteria (122 F.R.D. at 574; App. C-15), the motion to intervene came after a "final settlement had been reached by all parties." 799 F.2d at 538. There were no further proceedings to be conducted; the only purpose of intervention was to undo the negotiated settlement agreement which would otherwise terminate the litigation.

litigation over the allocation and management of natural resources will be able to use the timeliness requirement to freeze out non-parties from future decision-making processes. Indian tribes, in particular, will suffer, because of their dependance on natural resources and their limited ability to engage in litigation in multiple forums. It is vital for tribes to be able to intervene when the issues begin to involve them in a material way and when a decree or its implementation is likely to impact them -- even to the point, as here, of curtailing their livelihood. "[T]he Indians' participation in litigation critical to their welfare should not be discouraged." Arizona v. California, 460 U.S. at 615 (footnote omitted).

2. The Ninth Circuit Opinion Departs from Generally Accepted Practice in This and Related Cases.

That the Ninth Circuit has "so far

departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision," Sup. Ct. R. 10, is illustrated by comparing Makah's treatment to that of other applicants for intervention in this and related cases. The district court's decision was the first and only time in the history of northwest Indian fishing litigation that a federally recognized Indian tribe, with treaty rights to the runs at issue, has been denied intervention.

When Judge Boldt rendered Final Decision I in United States v. Washington in 1974, there were 14 tribal parties (including Makah and other tribes that fish in ocean waters now subject to Federal jurisdiction). 384 F.Supp. at 327 n.1 and 2. Today, 10 additional tribes participate as full parties, and the Columbia River tribes themselves sought and were granted

limited intervention in a United States v. Washington subproceeding in 1983 (13 years after the case was filed).

In this case, the Shoshone-Bannock Tribes were granted intervention in 1986, 18 years after the litigation began. In 1989, 21 years after the case began and a year after Makah was denied intervention, the district court granted intervention to the Colville Tribes, on the condition that the Colvilles "establish that they have federally secured off-reservation fishing rights with respect to fish covered by the Management Plan." 8-7-89 Order at 2.[37] Ten governments (the Federal Government, three states and six tribes) now participate as

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[37] No one disputes that Makah satisfies this condition. The only other condition imposed on the Colvilles was that they "accept the law of this case including the Columbia River Fish Management Plan as is now in effect." Id. To the extent Makah sought intervention to participate in future proceedings in the case, its motion to intervene satisfied this condition as well.

full parties in the case.

The Ninth Circuit offers a single argument to rationalize the singular exclusion of Makah, namely, that Makah's intervention would expand the geographic scope of the case. 913 F.2d at 588 (App. A-51-52). However, the Ninth Circuit never addresses how this alleged detriment is related to the timing of Makah's intervention. Its reliance on this factor departs without explanation from the principles the Ninth Circuit itself applied in holding Idaho was entitled to intervene in this case:

> The key point in this appeal, however, is that the existing parties' concerns have little to do with timeliness. They do not suggest that their problems are materially different now than they would have been had Idaho sought to intervene a decade or more ago. We find no basis in the record for holding that the intervention would prejudice the existing parties because of the passage of time. We therefore conclude that Idaho's application should not have been denied as untimely.

United States v. Oregon, 745 F.2d 550, 553 (9th Cir. 1984).[38]

By treating Makah's alleged delay as an essentially dispositive factor, with no showing of material prejudice as a result of the delay, the Ninth Circuit's opinion

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[38] There are other problems with the court's "geographic scope" argument: (1) it ignores the biological connection between in-river management and ocean fisheries, which gives Makah a direct interest in the in-river management activities at issue here; and (2) it ignores the interrelationship between the in-river and ocean management processes, and the conscious efforts of the existing parties to influence the ocean management process through negotiations and agreements in this case. Indeed, the court finds that Makah should have known that "ocean fishing might be discussed in the [existing parties'] negotiations," 913 F.2d at 589 (App. A-56), a finding squarely at odds with the proposition that ocean fishing is categorically outside the scope of this case. Finally, by collapsing the "geographic scope" issue into the "timeliness" analysis, the Ninth Circuit reviewed the district court's conclusion under the abuse of discretion standard, 913 F.2d at 588 (App. A-47), instead of the de novo standard otherwise applicable under Rule 24(a). See The Timeliness Threat, 89 Yale L. J. at 595 n. 44.

conflicts sharply with the reasoning of all other circuits that have considered the question and its own prior practice in this case. This Court should grant certiorari to clarify the importance of prejudice in the timeliness analysis and to address the Ninth Circuit's departure from accepted practice.

C. The Ninth Circuit's Decision Conflicts with this Court's Decision in Martin v. Wilks.

In Martin v. Wilks, 490 U.S. 755, 763-65 (1989), this Court held that the law does not impose on individuals a duty to intervene to protect their interests in litigation if they have not been joined as parties, even if they were aware that pending litigation might affect their interests.

In this case, the only way for Makah to participate and protect its interests in the annual in-river management process for Columbia River salmon, for years if not

decades to come, is to intervene in this lawsuit. Under Makah v. Verity, 910 F.2d at 559, 561, Makah cannot institute a separate action to challenge the results of that process, or of the interrelated ocean management process, because the Columbia River tribes have an interest in those results and cannot be joined against their will.

By holding that Makah is not entitled to intervene, the Ninth Circuit sacrificed Makah's ability, as a practical matter, to protect its fishing rights -- rights which are secured by treaty with the United States -- based on a prior failure to intervene in this case. This departs from the principles reaffirmed in Wilks that "everyone should have his own day in court," and that a party cannot be denied this right due to a "failure to intervene." 490 U.S. at 762, 765.

United States v. Oregon is one of a number of cases in which the judiciary has been called upon to supervise and oversee the on-going management and allocation of public resources.[39] One risk of long-term, on-going resolution of resource management decisions through private litigation is the lack of procedural safeguards to protect the public interest and the interests of non-

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[39] See, e.g., Idaho I, 444 U.S. at 390 n.7 (noting that the Court "might have to retain continuing jurisdiction over the management of the fisheries in the Columbia and Snake Rivers); United States v. Alpine Land and Reservoir Co., 887 F.2d 207, 210 (9th Cir. 1989) (district court has been exercising continuing jurisdiction since 1972 to review annual operating criteria for Truckee-Carson River system), cert. denied, 112 L. Ed. 2d 35 (1990); United States v. Washington, 520 F.2d 676, 693 (9th Cir. 1975) (Burns, J., concurring) ("to affirm [the Boldt decision] also involves ratification of the role of the district judge as a 'perpetual fishmaster'"); National Resources Defense Council v. Hodel, 624 F. Supp. 1045, 1062 (D. Nev. 1985) (noting that the courts have become forestmasters, fishmasters and rangemasters, among other things), aff'd 819 F.2d 927 (9th Cir. 1987).

parties. Judicially supervised resource management is not subject to the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, or the normal political mechanisms which allow public control over the legislative process.

Thus, in the context of on-going natural resources litigation, the practical importance of the right to intervene cannot be overstated. Where such litigation continues indefinitely, the principles reaffirmed in Martin v. Wilks would seem to require that non-parties, who are not represented by the existing parties, have the ability to intervene in future proceedings when such proceedings will affect their interests.

Under Rule 24, such intervention may not unduly interfere with the judicial process (for example, by disrupting a trial schedule) or unfairly prejudice the existing

parties (for example, by delaying relief). Where, as here, those factors are not present, non-parties should not be permanently frozen out due to a failure to intervene in prior years. This Court should grant certiorari to resolve this conflict between the Ninth Circuit's decision in this case and Martin v. Wilks.

Respectfully submitted,

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April 11, 1991.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee. CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION, et al.; CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; NEZ PERCE INDIANS, Intervenors-Appellees, STATE OF IDAHO, SHOSHONE-BANNOCK TRIBE, Intervenors-Appellants, MAKAH INDIAN TRIBE, Applicant in Intervention Appellant, v. STATE OF OREGON; STATE OF WASHINGTON, Defendants-Appellees.	Nos. 88-4311; 88-4316; 88-4347 D.C. No. CV-68-513-MA OPINION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
MALCOLM F. MARSH, DISTRICT JUDGE, PRESIDING

ARGUED AND SUBMITTED
JANUARY 10, 1990--SEATTLE, WASHINGTON

FILED AUGUST 27, 1990
United States v. Oregon

Before: James R. Browning, Robert R. Beezer and Pamela Ann Rymer, Circuit Judges

Opinion by Judge Beezer

BEEZER, Circuit Judge:

These appeals concern the Oregon district court's approval of a plan allocating the harvest of Columbia River salmon and steelhead. The State of Idaho and the Shoshone-Bannock tribes challenge the allocation of fish that reach Idaho. They opposed the plan at the time of the district court's approval hearings, but the court approved the plan over their objections. The Makah, an ocean fishing tribe, challenge the quota allocated to the

ocean fishery. They sought to intervene in the suit, but their motion was denied. Each party appeals the adverse rulings affecting it. We affirm.

I

A complex judicial and administrative scheme has evolved to regulate the harvest of Columbia River salmon and steelhead. These fish travel hundreds of miles along an arduous migratory route and are very valuable. See Idaho ex rel. Evans v. Oregon, 444 U.S. 380, 382 (1980) (Idaho I). Ordinarily, regulation of these fisheries would be a local matter, determined by state law. However, in 1968, the Supreme Court held that Indian tribes with treaty rights to fish may not be limited by state regulations that infringe on those rights. Puyallup Tribe v. Department of Game, 391

U.S. 392 (1968). Shortly thereafter, suits were filed in the federal district courts of Oregon and Washington to enforce this standard against the states. See Sohappy v. Smith/United States v. Oregon, 302 F. Supp. 899 (D. Or. 1969); United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976). Both courts retain continuing jurisdiction. In addition, Congress enacted the Fishery Conservation and Management Act of 1976 (FCMA),[1] which regionalizes fishery management and can preempt state regulation.

United States v. Oregon became the forum for allocating the harvest of fish that enter the Columbia River system. See United States v. Oregon, 699 F.Supp. 1456,

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[1]Pub.L.No. 94-265, 90 Stat. 331 (codified at 16 U.S.C. § 1801 et seq.).

1458-60 (D.Or. 1988); Comment, Sohappy v. Smith: Eight Years of Litigation Over Indian Fishing Rights, 56 Or. L. Rev. 680 (1977). The parties to the suit are the states of Washington, Oregon, and Idaho, four Columbia River treaty tribes (Yakima, Nez Perce, Umatilla and Warm Springs), the Shoshone-Bannock tribes and the Colville tribe. The fishery is directly regulated by the states of Washington and Oregon under the 1918 Columbia River Compact.[2] Harvest quotas are set by the compact states after negotiations with the other parties and adopted with court approval. A Technical Advisory Committee advises the Oregon court.

United States v. Washington became the

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[2]Pub.L.No. 64-123, 40 Stat. 515 (1918). The Compact requires that all state regulation of Columbia River fisheries be consistent. Idaho is not a party to the Compact, though it has tried to join. See Idaho I, 444 U.S. at 384.

forum for allocating the fishing rights within the jurisdiction of the state of Washington, extending three miles out to sea. See United States v. Washington, 384 F.Supp. at 312. The parties to the action include the Puget Sound treaty tribes, ocean treaty tribes (including the Makah[3]), certain Columbia River tribes for limited purposes, and the state of Washington. A Fisheries Advisory Board advises the Washington court.

Outside the three-mile limit, ocean fishing is regulated by the federal government under the FCMA. The FCMA establishes the Pacific Fishery Management Council (PFMC), which is composed of representatives of Washington, Oregon,

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[3]The Makah were guaranteed the right to fish by the Treaty of Neah Bay, 12 Stat. 939, Jan 31, 1855. Their reservation is at the northwest corner of the Olympic Peninsula of the state of Washington.

California and Idaho, one representative of the Indian tribes, and the federal government. 16 U.S.C. § 1852(a)(6). The PFMC develops a regional fishery management plan which must be consistent with applicable law, including Indian treaty rights, and must consider the regulations of coastal states. 16 U.S.C. §§ 1853(a)(1)(C); 1853(b)(5).

These appeals concern the most recent Columbia River Fish Management Plan, approved by the Oregon court in 1988. It was negotiated by the parties to the suit from 1983 to 1987 and is intended to be effective for 10 years. In its final form, the plan sets minimum "escapement" levels for all Columbia River runs with quotas low enough to protect the weakest runs.

Idaho and the Shoshone-Bannock tribes

fear the plan gives inadequate protection to Idaho wild steelhead. They also allege defects in the court's approval process. The Makah, not a party to the suit, contend that the plan assigns most of the allowable catch of the weakest run to river fishermen, requiring low ocean quotas. They seek to intervene to oppose the ocean quotas and to participate in future negotiations.

We have jurisdiction over these timely appeals under 28 U.S.C. § 1291. The court's order approving the 1988 plan is an appealable post-judgment final order under the district court's continuing jurisdiction. United States v. Washington, 761 F.2d 1404, 1406-07 (9th Cir. 1985). Denial of a motion to intervene is a final order and immediately appealable. Diaz v. Trust Territory of the Pacific Islands, 876 F.2d 1401, 1404 (9th Cir. 1989).

II

Idaho's Opposition to the Plan

Idaho opposed the 1988 plan chiefly because it provides insufficient protection for Idaho wild steelhead, which Idaho believes could face extinction. Accordingly, although Idaho participated in the negotiations, it did not sign the final plan. Idaho now challenges the court's approval of the plan on procedural and substantive grounds.

A. Procedural Claims

Idaho first argues that the district court erred because it considered Idaho's opposition to the plan to be a request for an injunction, placing the burden on Idaho to show the balance of hardships weighed in its favor. Idaho argues that the plan is

more like a consent decree, requiring the court to review the substance of the plan for legality and fairness, with the burden on the proponents.

A consent decree is "essentially a settlement agreement subject to continued judicial policing." Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983). It is not a decision on the merits or the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise. See United States v. Armour & Co., 402 U.S. 673, 681-82 (1971). Consent decrees are often designed to be carried out over a number of years. Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 523 n.13 (1986). We have implied in earlier decisions that agreements reached in this matter may be consent decrees. See, e.g., United States v.

Oregon, 769 F.2d 1410, 1416 (9th Cir. 1985).

On appeal, all parties state that the plan is most like a consent decree. We agree that this characterization fits here. We review acceptance of a consent decree for abuse of discretion. Davis v. City & County of San Francisco, 890 F.2d 1438, 1445 (9th Cir. 1989); Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco, 688 F.2d 615, 625-26 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983). Under this standard, we will reverse the district court only if its decision was based on an error of law or clearly erroneous findings of fact. United States v. Oregon, 769 F.2d at 1416. We may not substitute our notion of fairness for that of the district court. Davis, 890 F.2d at 1445.

Idaho identifies several aspects of the district court's ruling that it contends are errors of law. We discuss each in turn.

1. Standard of review by district court

Idaho first argues that the district court applied the wrong legal standard to evaluate the plan. It argues that the court applied a balance of hardships test, when a more rigorous investigation into the legality of the plan was required.

Before approving a consent decree, a district court must be satisfied that it is at least fundamentally fair, adequate and reasonable. Id. In addition, because it is a form of judgment, a consent decree must conform to applicable laws. See United States v. City of Miami, 664 F.2d 435, 439,

441 (5th Cir. 1981) (en banc) (per curiam) (Rubin, J., concurring); see also SEC v. Randolph, 736 F.2d 525, 528 (9th Cir. 1984) (citing Miami with approval).

However, a consent decree need not impose all the obligations authorized by law. See Local Rule 93, 478 U.S. at 522-23; EEOC v. Safeway Stores, Inc., 611 F.2d 795, 800 (10th Cir. 1979) (consent decree will not be vacated "merely because it is legally erroneous"), cert. denied, 446 U.S. 952 (1980). Rather, the court's approval "is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" Officers for Justice, 688 F.2d at 625 (citation omitted). The court need only be satisfied that the decree represents a "reasonable factual and legal determination." Miami, 664 F.2d at 441.

Idaho argues that a consent decree that affects the public interest or third parties imposes a heightened responsibility on the court to protect those interests. Although we have recognized that the court has such a duty, see Davis, 890 F.2d at 1444 n.5; Randolph, 736 F.2d at 529; we have also held that this requirement is intended to protect those who did not participate in negotiating the compromse, not those who negotiated it. Collins v. Thompson, 679 F.2d 168, 172 (9th Cir. 1982). Furthermore, the court need not require that the decree be "in the public's best interest" if it is otherwise reasonable. Randolph, 736 F.2d at 529 (emphasis in original).

Applying these principles to the court's approval of the 1988 plan, we find no error here. The district court stated it would employ a balancing test to evaluate

Idaho's objections, but in evaluating the relative hardships it examined not only the plan's fairness and reasonableness, but also its legality and impact on the public interest. The district court concluded that this plan was reasonable and legal. This standard was not erroneous.

2. Burden of Proof

Idaho next argues that by characterizing its objections as a motion for an injunction, the court erred in placing the burden of proof on Idaho instead of the parties seeking acceptance of the plan.

In this circuit, we have usually imposed the burden on the party objecting to a class action settlement. See Moore v. City of San Jose, 615 F.2d 1265, 1272 (9th

Cir. 1980). Likewise, other circuits have held that once the court is satisfied that the decree was the product of good faith, arms-length negotiations, a negotiated decree is presumptively valid and the objecting party "has a heavy burden of demonstrating that the decree is unreasonable." Vukovich, 720 F.2d at 921; accord, Stotts v. Memphis Fire Dept., 679 F.2d 541, 554 (6th Cir. 1982), rev'd on other grounds, 467 U.S. 561 (1984); cf. Bass v. FSLIC, 698 F.2d 328, 330 (7th Cir. 1983) (collusive settlement with third party voids usual deference to settlement agreement). Idaho does not contend that the negotiations were collusive.

Idaho cites several cases regarding class action settlements where other circuits have placed the burden on the party moving for approval. However, these cases

generally involve agreements distributing a large share of class funds to certain named plaintiffs. See, e.g., Plummer v. Chemical Bank, 668 F.2d 654, 656 (2d Cir. 1982); Holmes v. Continental Can Co., 706 F.2d 1144, 1147 (11th Cir. 1983). We conclude that the district court did not impose an improper burden here.

3. Evidentiary Hearing

Idaho next argues that the court erred because it did not conduct a full evidentiary hearing. At the hearing on the motion for approval of the plan, Idaho presented detailed affidavits from two experts showing the threat to the wild steelhead. The parties seeking approval of the plan presented an affidavit that contradicted some of Idaho's conclusions. Idaho argues that it should have had a

chance to cross-examine witnesses and conduct further discovery.

We disagree. First, although some circuits have allowed cross-examination of witnesses at hearings on class action settlements, see, e.g., Greenfield v. Villager Industries, Inc., 483 F.2d 824, 833 (3d Cir. 1973) (shareholder suit); Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (citing Greenfield); other courts have rejected this requirement. "The growing rule is that the trial court may limit its proceeding to whatever is necessary to aid it in reaching an informed, just and reasoned decision." Cotton v. Hinton, 559 F.2d 1326, 1331 (5th Cir. 1977). See also Plummer, 668 F.2d at 659 (court not expected to "convert settlement agreement hearings into trials on the merits"); City of Detroit v. Grinnell Corp., 495 F.2d 448, 462 (2d

Cir. 1974) (court "must stop short of the detailed and thorough investigation" of a trial).

We think the latter is the better rule. A disputed decree that lacks the consent of those who negotiated it may be approved, so long as each party is given the opportunity to "air its objections" at a reasonableness or fairness hearing.[4] Local 93, 478 U.S. at 529; see, e.g., Davis, 890 F.2d at 1444; Vukovich, 720 F.2d at 921. The reviewing court should not determine contested issues of fact that underlie the dispute. Officers for Justice, 688 F.2d at 625.

Idaho nevertheless argues that the

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[4] If such a decree is entered, a nonconsenting party is not bound by an obligation to which it did not agree. Local 93, 478 U.S. at 529. If a remedy is sought against a nonconsenting party, the matter must be remanded for trial. Miami, 664 F.2d at 436.

district court made no effort to find out the true facts regarding the steelhead runs, when the evidence presented was contradictory. We have remanded class action settlements if the record reveals no inquiry into the facts in dispute. See Ficalora v. Lockheed Calif. Co., 751 F.2d 995, 996 (9th Cir. 1985). We have also required evidentiary hearings when there was some dispute about the existence or terms of the agreement itself. See Callie v. Near, 829 F.2d 888, 890-91 (9th Cir. 1987). However, if the district court had sufficient facts to approve the plan intelligently, then "there is no reason to hold an additional hearing on the settlement or to give appellants authority to renew discovery." Grinnell Corp., 495 F.2d at 463. Familiarity of the court with the lawsuit can be an important factor. Miami, 664 F.2d at 441 nn.13, 14. Here the record,

files and transcripts had been building for years, providing a solid base for intelligent approval of the plan.

Idaho further argues that even if a consent decree does not require an evidentiary hearing, ruling on an injunction coupled with a decision on the merits does. We have recognized that if the facts are simple and little time would be taken, a court may be required to hold an evidentiary hearing on a motion for an injunction. Aguirre v. Chula Vista Sanitary Serv. and Santi-Tainer, Inc., 542 F.2d 779, 781 (9th Cir. 1976). However, we have rejected any presumption in favor of evidentiary hearings, especially if the facts are complicated, as they are here. See International Molders' Local Union No. 164 v. Nelson, 799 F.2d 547, 554-55 (9th Cir. 1986). Furthermore, approval of a

negotiated agreement is not a decision on the merits and the court should not resolve underlying factual disputes at this stage. Officers for Justice, 688 F.2d at 625.

Viewing the court's approval of the plan as a ruling on either a consent decree or an injunction, we find no error in the court's denial of further evidentiary hearings or discovery. Idaho was permitted to "air its objections" and present its extensive factual analysis. This meets the standard required of the district court. See Local 93, 478 U.S. at 529.

B. Legality of the Plan

Idaho next argues that the district court erred in approving the plan because it violates legal standards in two important respects. Idaho's chief objection is that

it violates applicable conservation standards because the plan threatens its wild steelhead with extinction. It also argues that the plan violates treaty/non-treaty sharing formulas set by the court in this case. Idaho argues that these requirements are absolute and cannot be traded away in negotiations.

1. Steelhead

Idaho argues that the plan violates conservation standards established in this case because it threatens the wild steelhead with extinction.[5] Idaho proposed ways to

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[5]Idaho argues that the 1988 plan threatens the species in several ways. First, the plan has no "safety net," but sets steelhead harvest levels at 32%, a rate that already threatens the species. This level is much higher than the rate of 10% or less set for other species. This rate was in effect for two years before approval of the plan; Idaho cannot yet measure the impact of those harvests, but estimates it to be high. Second, because the percentage

alleviate this problem but they were rejected during negotiations. The other parties respond that they have no duty to conserve the species, that the conservation standards Idaho cites are not legally enforceable, that Idaho's proposed alternatives are unworkable and that, in any event, the plan does not threaten the steelhead.

We reject any suggestion that the states of Washington and Oregon have no duty to conserve the species. In Idaho ex rel.

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is fixed, geographical conditions such as drought could suddenly make the rate too high. Third, the steelhead return is difficult to predict, so harvest rates must be allowed to change momentarily with actual measured return. Fourth, the plan allows the use of gill nets instead of selective fishing techniques while harvesting chinook. The steelhead become intermingled with fall chinook, an abundant stock, and the nets catch both. Finally, the "emergency" measures built into the plan require further negotiation and will require delay, making them tantamount to establishing an "imminent extinction" standard.

Evans v. Oregon, 462 U.S. 1017, 1025 (1983) (Idaho II), an action brought by Idaho against Oregon and Washington under the Supreme Court's original jurisdiction, the Court established Idaho's equitable entitlement to some share of Columbia River fish. The Court held that the fish are a natural resource like water, and they may not be "owned" or depleted by any state along their path. See id. at 1024. Thus Idaho "has no legal right to the anadromus fish hatched in its waters" but it does have "an equitable right to a fair distribution of this important resource." Id. at 1025. Accordingly, Oregon and Washington "have an affirmative duty under the doctrine of equitable apportionment to take reasonable steps to conserve and even augment the natural resources within their borders for the benefit of other states." Id. Any plan that harms the runs "could not or should not

survive a finding by this Court that Idaho is entitled to some of those fish." Idaho I, 444 U.S. at 392.

Idaho does not base its argument here on its entitlement to an equitable apportionment.[6] Nevertheless, we may reject the argument of the compact states that they have no duty to conserve a species that passes through their waters. When we allowed Idaho to intervene in this suit we acknowledged that it has a protectable interest in the fish. See United States v. Oregon, 745 F.2d 550, 553 (9th Cir. 1984). Idaho points to other instances in the law of this case imposing an enforceable duty on states and tribes. For example, at the beginning of this action, the district court

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[6]Idaho has disclaimed any intent to assert any claims directly against the states in this lawsuit. United States v. Oregon, 745 F.2d at 553.

held that a state may be prohibited from managing a fishery so that "little or no harvestable portion" reaches historic tribal fishing places. Sohappy, 302 F.Supp. at 911. We recognized a moral and equitable responsibility on the part of tribes "to allow sufficient escapement" by observing conservation levels set by the state. United States v. Washington, 520 F.2d 676, 686 n.3 (9th Cir. 1975). We held that treaty rights presume there are fish to allocate and we "may enjoin those who would interfere with that custody." United States v. Oregon, 657 F.2d 1009, 1015 (9th Cir. 1982) (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 692 n.32 (1979)). We have held that "neither the treaty Indians nor the state . . . may permit the subject matter of these treaties to be destroyed." United States v. Washington, 520 F.2d at

685.

Whether the plan violates this duty not to destroy the runs is less clear. The Idaho II Court held that to show injury, Idaho "must prove by clear and convincing evidence some real and substantial injury or damage . . . based on present conditions." Idaho II, 462 U.S. at 1027 (internal citations omitted). By this logic, to show the 1988 plan is "illegal," Idaho would have to show by clear and convincing evidence that the runs have already suffered substantial injury under the plan. Idaho concedes that it cannot show present injury because no steelhead runs harvested at the high rate called for in the plan have yet returned to be measured.

Idaho argues instead that we should adopt the standards of conservation we have

allowed in our earlier decisions in this matter and apply them to the duty we recognize here. In those decisions we have held that states may limit allocations to treaty fishermen for conservation purposes by a "comfortable margin." United States v. Oregon, 718 F.2d 299, 305 (9th Cir. 1983). We have recognized that "some limitations are needed to preserve the population" of wild fish and emphatically rejected the argument of treaty fishermen that states may limit their harvests only when a run becomes endangered. Id. at 304-05. Rather, "a 'reasonable margin of safety' between an existing level of stocks and the imminence of extinction is the heart and soul of conservation." Id. at 305; see also United States v. Oregon, 769 F.2d at 1416 (states may limit treaty harvests in manner that is the "'least restrictive which can be imposed consistent with assuring the necessary

escapement of fish for conservation purposes.'") (citation omitted).

These decisions have not, however, established a duty to limit treaty harvests for conservation purposes by a "comfortable margin." In fact, we have noted that the compact states have entered into agreements that did not consider conservation at all. See United States v. Oregon, 769 F.2d at 1417 n.6. We are reluctant to hold as a matter of law that limits on treaty harvests voluntarily adopted by the states must be grafted onto the duty to see that the runs are not destroyed.

It is not necessary that we do so on this record in this case, because in any event the district court did not err in approving the plan. Idaho's methods of calculating escapement goals and estimating

spawning escapement are based on different scientific estimates from those underlying the plan and those used in prior management plans. However, its proposals were not submitted to the other parties for evaluation and negotiation within the framework of the plan. Thus, the other parties' technical representatives never had the opportunity to analyze the conclusions that Idaho reaches. The appellee States and tribes presented evidence that wild steelhead had been managed under guidelines identical to those in the plan during the years 1984-1987, and the runs were above or near escapement goals for those years.

The district court was therefore presented with two management proposals, one based on methods never presented to TAC for peer review evaluation, the other containing guidelines identical to those adopted in

previous years. The court held that Idaho "should first bring its concerns to TAC within the existing structure and not as an objection to adoption of the 1988 plan itself." It also noted that the plan had built-in flexibility to accommodate Idaho's concerns. First, the plan's steelhead management scheme is only in effect for three years and all of the provisions affecting steelhead management are subject to review after the 1988 season. For this reason, as the district court stated, "the Plan itself allows Idaho the opportunity to continue its negotiations and assert its recommendations with the moving parties for further consideration of steelhead conservation." Further, the plan allows for modifications in the event that Idaho's methods of calculating spawning escapement prove correct. Second, the plan contains emergency modification procedures that could

be implemented if the wild steelhead returns show a significant decline. Finally, the district court retains continuing jurisdiction to grant further or amended relief. In light of these considerations, we are not left "with the definite and firm conviction that a mistake has been committed." United States v. Oregon, 718 F.2d at 305 (internal quotation and citations omitted).

We are sympathetic to Idaho's position. We have consistently recognized that conservation is an important goal of resource management. See United States v. Williams, 898 F.2d 727, 729 (9th Cir. 1990). There is no doubt that the health of the wild steelhead run and each of the other stocks is of vital importance to Idaho and the entire region. These fish have evolved into a marvelously interdependent ecosystem

that cannot be compartmentalized. The vitality of wild stocks is important to the health of hatchery fish, which are vulnerable to accident and disease.[7] Our concern is heightened by the fact that the current, imperfect regional scheme provides only fractured management of this unitary resource.

We therefore encourage the district court to monitor this situation closely. The district court supported its decision in part by noting that the steelhead runs are specially designated for review to take place after the 1988 season. If the situation proves to deteriorate, the

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[7]In 1987, for example, the weakest run was from the Spring Creek Hatchery, located above Bonneville Dam. The run had been decimated several years earlier by an outbreak of disease. See generally Goodman, Preserving the Genetic Diversity of Salmonid Stocks: A Call for Federal Regulation of Hatchery Programs, 20 Envtl. L. 111, 137 (1990).

district court can and should modify its order immediately. See United States v. Oregon, 769 F.2d at 1415.

2. Treaty/Nontreaty Share

Idaho objects that the spring chinook harvest schedule violates the treaty/nontreaty sharing formulas required by the law of this case. That allocation is generally agreed to be 50% to each and "all fish count." Idaho argues that under the plan, spring chinook are harvested in the Columbia River as well as its tributaries, but these catches are allocated separately. Treaty fishermen may harvest 50% of the runs in the Columbia River without limiting the treaty take in the tributaries, such as Idaho's rivers. Counting the harvests separately, Idaho contends, amounts to "double dipping."

Idaho's argument is grounded in the holding of the Supreme Court in Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, that "[b]oth sides have a right, secured by treaty, to take a fair share of the available fish." 443 U.S. at 684-85. The "harvestable portion of each run that passes through a 'usual and accustomed' place" should be divided "into approximately equal treaty and nontreaty shares." Id. at 685. The "maximum possible allocation to the Indians is fixed at 50%," id. at 686, regardless of where the fish are taken. Id. at 687.

Deviations from this exact formula have been tolerated to accommodate the complex sharing required by the unique nature of the Columbia River runs and the parties that are entitled to share it. See United States v. Oregon, 718 F.2d at 301-02 (60% treaty-40%

nontreaty to compensate for nontreaty ocean fishery). The district court reasoned that the plan's sharing formula was similarly fair for the system as a whole. To alter the ratios for a "subplan" could upset the delicate balance achieved among the parties. A consent decree need not include all of the obligations authorized by law, so long as it is reasonable. The district court examined this aspect of the plan and concluded it was reasonable. We agree.

III

Shoshone-Bannock Opposition to the Plan

The Shoshone-Bannock tribes (the Shoshone) are located along the Salmon River, a tributary of the Snake River, in Idaho. They participated in the negotiations but did not sign the plan, in part because their treaty rights have not

been finalized and therefore are not defined in the plan.[8] Like Idaho, they argue that the plan should be rejected for both procedural and substantive reasons.

A. Procedural Claims

The Shoshone, like Idaho, argue that the plan was in essence a consent decree. We agree that this characterization fits the plan. The Shoshone allege, however, that the negotiations leading to the plan were collusive, defeating any presumption of validity.

The Shoshone make numerous factual allegations. They charge that the United

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[8]The Shoshone were guaranteed the right to hunt by the Fort Bridger Treaty. 15 Stat. 673, July 3, 1868. The treaty has been construed to include the right to fish. State v. Tinno, 94 Idaho 759, 497 P.2d 1386 (1972).

States and other parties colluded to exclude them from negotiations and held secret meetings regarding the Salmon River basin allocations. They argue that after intervention, they tried to present their treaty rights to the other parties but were ignored and the United States interpreted their rights restrictively, even to the court. They further argue that in light of the historical record of their exclusion, the court should have more carefully scrutinized the present proceedings.

The district court's role in reviewing the essentially private agreement among the parties is "limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." Offices for Justice, 688 F.2d at 625. The district court,

examining the record, made such a determination. It concluded that though the negotiations were marked by dispute, they were not fundamentally unfair. In light of the limited record provided by the Shoshone, we find that the court's conclusion was not clearly erroneous.

B. Legality of the Plan

The Shoshone next argue that the plan violates legal standards because it does not protect their treaty rights or provide for necessary conservation.

1. Treaty rights

The Shoshone treaty rights have been recognized to include the right to fish, but have not been more specifically defined. To accommodate the Shoshone, the district court

amended the plan to ensure them full participation despite their uncertain status. The other parties recognize that Shoshone treaty rights should be protected, and the agreement is designed to incorporate those treaty rights when finalized.

The Shoshone object that these provisions are not adequate because the plan still does not grant them "equal protection." Though they may now participate as a "management entity," the committee structure established by the plan remains majoritarian. The "strategically located" downstream tribes can dominate allocation of the runs.

The Shoshone seek substantive protection for their interests, but they do not present a concrete proposal. They do request, however, that the plan be limited

to one-year periods to allow them greater involvement.

The district court considered these arguments and concluded that the Shoshone are treated like any other tribe under the plan. No party controls or participates in all the subplans and the Shoshone are not barred from any governing committees. Their treaty rights are recognized and are not violated by the plan. The court determined that it should not create an exception for a single tribe. This determination was not an error of law. In light of the record before us, we find no abuse of discretion.

2. Conservation

The Shoshone next argue that the plan is not in the public interest because it does not foster cooperation or conservation.

The Shoshone do not request a larger share of fish for themselves but worry that the plan is "harvest-driven" and will not protect the fish that spawn in their waters.

The Shoshone propose two solutions. First, they suggest that the plan should be coordinated with the Northwest Power Planning Council, a congressionally established body that oversees operation of dams and fish hatcheries. The Shoshone argue that the council's regional view will better protect and rebuild the runs. However, Congress has not entrusted the council with the task of allocating regional fisheries. Furthermore, the district court concluded that the reach of this lawsuit was not regional. The district court has discretion to control the course of proceedings before it. See Natural Resources Defense Council v. Costel, 561

F.2d 904, 911 (D.C. Cir. 1977). This decision was within that discretion.

In the alternative, the Shoshone suggest again that the plan operate for one-year periods only. The district court rejected this proposal as too costly because it would be a significant alteration of the plan. Numerous review procedures are built into the plan and the court has retained continuing jurisdiction with which it can evaluate future conservation needs. Our review of the record "does not leave us with the definite and firm conviction that a mistake has been committed." United States v. Oregon, 718 F.2d at 305 (internal quotations and citations omitted.).

IV

Makah Motion to Intervene

The Makah Indian Tribe is not a party to this action and seeks to intervene. The Makah state that they tried unsuccessfully for some time to participate in the Oregon negotiations. However, they never officially sought to intervene before because they were reassured that the ocean catch was not a subject of the negotiations. Nevertheless, after publication of the final draft of the 1988 plan, it was evident that limits on the ocean harvest were important to the success of the plan. At the time of the approval hearings, the Makah presented objections to the plan and also brought a motion under Fed. R. Civ. P. 24 to intervene as of right or in the alternative for permissive intervention.

A. Intervention as of Right

Fed. R. Civ. P. 24(a)[9] establishes four requirements for intervention as of right: timeliness; an interest relating to the subject of the action; practical impairment of the party's ability to protect that interest; and inadequate representation by the parties to the suit. Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 308 (9th Cir. 1989). The rule is construed broadly in favor of applicants for intervention. United States v. Oregon, 839 F.2d 635, 637

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[9]Rule 24(a) reads:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(9th Cir. 1988) (unrelated case) (residents of institution allowed to intervene).

The district court denied the Makah motion to intervene as untimely, prejudicial to the parties, and inappropriate because the Makah fishery is directly regulated by the PFMC and their proper remedy was with that body. The court further held that the geographical scope of the suit would not extend past the mouth of the Columbia River and that the plan did not bind the federal officials who signed it. We review a district court's denial of a motion to intervene as of right de novo, United States v. Stringfellow, 783 F.2d 821, 825 (9th Cir. 1986), cert. dismissed sub nom. Stringfellow v. Concerned Neighbors in Action, 478 U.S. 1030 (1968), except the question of timeliness, which is reviewed for abuse of discretion. NAACP v. New York, 413 U.S.

345, 366 (1973); United States v. Oregon, 745 F.2d at 552.

1. Timeliness

Timeliness is the threshold requirement for intervention. We consider three criteria to evaluate timeliness: the stage of the proceeding, prejudice to other parties, and the reason for and length of the delay. United States v. Oregon, 745 F.2d at 552.

a. Stage of the proceeding. Although this action had been underway for nearly twenty years when the Makah sought to intervene, the length of time that has passed since a suit was filed does not alone determine timeliness. See NAACP, 413 U.S. at 366. The Makah argue that since adoption of the plan commences a new stage in the

action, they should be allowed to intervene at least for future proceedings. Courts have allowed intervention after entry of consent decrees, but chiefly in the remedial phase of discrimination suits where the decree had an unexpected effect on a nonparty. See United States v. City of Chicago, 870 F.2d 1256, 1259-60 (7th Cir. 1989) (decree affects intervenors' chances of promotion); Howard v. Lucas, 782 F.2d 956, 959-60 (11th Cir. 1986) (same); Hodgson v. United Mine Workers of America, 473 F.2d 118, 129 (D.C. Cir. 1972) (remedial phase of labor dispute). These courts have generally specified that no previously litigated issues may be reopened. See id.

This is not, however, the "remedial phase" of a dispute. We have held in other contexts that waiting until after entry of a consent decree weighs heavily against

intervention. County of Orange v. Air California, 799 F.2d 535, 538 (9th Cir. 1986) (entry of settlement after five years of litigation preceded by well-publicized negotiations is too late a stage to intervene), cert. denied, 480 U.S. 946 (1987). Similarly, intervention on the eve of settlement may be untimely. Aleut Corp. v. Tyonek Native Corp., 725 F.2d 527, 530 (9th Cir. 1984).

The Makah next argue that intervention in an ongoing proceeding cannot be judged by the same criteria as a more limited lawsuit. In support, they cite Dowell v. Board of Educ., 430 F.2d 865, 868 (10th Cir. 1970). However, in that case the movants had previously been allowed to intervene temporarily, were treated as parties, and had attended all hearings before requesting full intervention.

The Makah next argue that their intervention would be timely at least for the limited purpose of challenging the plan. On appeal, the Makah state that they wish to participate in future negotiations. However, the Makah did not originally request limited intervention. The district court concluded that there was no way to limit the involvement of the Makah to one issue.

Finally, the Makah point out that the state of Idaho, the Shoshone and now the Colville tribe have all been allowed to intervene after 15, 17 and 21 years of litigation respectively. The Makah state they are willing to accept the same conditions of intervention that were imposed on these parties. However, they cannot. One of Idaho's conditions was that it not expand the geographical scope of the suit.

The Makah seek to intervene precisely to regionalize negotiations over Columbia River fish. This greatly expands the scope of the existing case.

The district court concluded that at this stage, it is too late in the proceeding to change the nature of the suit so dramatically. In light of the district court's discretion to control the course of proceedings before it, Costel, 561 F.2d at 911, this decision was not an abuse of discretion.

b. Prejudice. One of the "most important" factors in determining timeliness is prejudice to the existing parties. United States v. Oregon, 745 F.2d at 552. The district court held that intervening at this stage to challenge the plan would seriously prejudice all the parties to the

suit because the plan is complex and delicately balanced. That the compromise is delicate is evident from the fact that after over four years of negotiation, certain points of the final plan are still disputed by some parties.

The Makah do not deny this but respond that the parties to the suit deceived them regarding the content of the negotiations and cannot now claim prejudice, citing Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977). In that suit, however, the court found deception an "unusual circumstance" weighing in favor of intervention, but did not hold it defeated a finding of prejudice, which remained discretionary. Id. at 267.

The Makah also argue that limiting intervention for the purpose of future

proceedings will not prejudice the parties' past efforts. The district court, however, reasoned that allowing intervention at this stage could still upset the delicate balance the parties have achieved, citing County of Orange, 799 F.2d at 538 ("[T]he possibility of this settlement unraveling is so prejudicial that to allow the [city] to intervene at this late date would be tantamount to disaster"). This conclusion was not an abuse of discretion.

c. Reason for and length of delay. The district court found that when the Makah moved to intervene, they provided no explanation for their delay. On appeal, the Makah correct this oversight. They argue that they delayed because they did not know that their interests would be directly affected by these proceedings.

A party seeking to intervene must act as soon as he "knows or has reason to know that his interests might be adversely affected by the outcome of the litigation." City of Chicago, 870 F.2d at 1263 (internal quotation and citations omitted). Here, the other parties contend that the Makah had ample notice of the proceedings and should have known ocean limits could be discussed. They cite, for example, the 1985-1987 annual plans, each entitled "In-River and Ocean Fishery Plan." Moreover, the Makah concede that they made frequent inquiries about the nature of the negotiations and attempted repeatedly to participate, showing they were aware there was some risk to them from the negotiations. See Alaniz v. Tillie Lewis Foods, 572 F.2d 657, 659 (9th Cir.), cert. denied, 439 U.S. 837 (1978).

The Makah also argue that they were the

victims of intentional deception. Courts have held that if the parties made it "more difficult for the [intervenors] to acquire information about the suit early on" they may not "now be heard to complain that the [intervenors] should have know about it or appreciated its significance sooner." Stallworth, 558 F.2d at 267; cf. Alaniz, 572 F.2d at 659 (noting absence of fraud). Because the Makah did not raise this argument before the district court, it made no finding on this subject. On the record before us, it appears the Makah were at least aware that ocean fishing might be discussed in the negotiations despite the alleged statements to the contrary by the other parties. In light of the several factors evaluated by the court, we do not find the Makah's argument that they were deceived sufficient to make the district court's decision an abuse of discretion. We

affirm its decision that the Makah's motion to intervene was untimely.

2. Other Elements

Because we affirm the district court's decision that the Makah's motion was not timely, we need not reach any of the remaining elements of the test set forth in Rule 24. County of Orange, 799 F.2d 538. The motion to intervene was properly denied.

B. Permissive Intervention

The Makah moved in the alterative for permissive intervention. Rule 24(b) grants the court discretion to allow intervention if "an applicant's claim or defense and the main action have a question of law or fact in common." The application must also be timely. A finding of untimeliness defeats

this motion as well. County of Orange, 799 F.2d at 539. The court's denial of permissive intervention was not an abuse of discretion.

C. Objections to the Plan

At the time of the approval hearings, the Makah submitted several objections to the plan. The district court considered these objections and approved the plan over them. Since the Makah are not parties to the suit, their status is similar to that of an amicus curiae, see Miller-Wohl Co. v. Commissioner of Labor & Industry, 694 F.2d 203, 204 (9th Cir. 1982), and they may not appeal the court's decision. Moten v. Bricklayers Int'l Union, 543 F.2d 224, 227 (D.C. Cir. 1976).

V.

Conclusion

The district court's order approving the plan is affirmed, with each party to bear its own costs.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, and THE CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION; THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; AND NEZ PERCE TRIBE OF IDAHO, Intervenors, v. STATE OF OREGON, STATE OF WASHINGTON, Defendants. and STATE OF IDAHO and SHOSHONE-BANNOCK TRIBES. Intervenors.	Civil No. 68-513-MA AMENDED ORDER

MARSH, Judge.

For the reasons discussed in the amended opinions filed herewith, amending opinions filed herein September 9, 1988, the Makah Tribe's motion to intervene (#1508) IS DENIED and the motion for order approving Columbia River Fish Management Plan (#1490) IS GRANTED with the following amendments:

1. Page 3, Section I.A., add numeral 9. Shoshone-Bannock Tribe, subject to Section I.G.

2. Page 12, Section I.E., lines 4-6, delete "of the tribes party to this agreement" and insert "of the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes & Bands of the Yakima Indian Nation, the Confederated Tribes of the Umatilla Indian Reservation and the Nez Perce Tribe."

3. Page 16, Section I.G., line 0, change "party" to "signatory party."

4. Page 16, Section I.G., line 5-6, delete "for all issues concerning the Salmon River subbasin."

5. Page 17, Section I.G., line 3, delete "nonparty."

6. Page 44, Section III.C., line 18, delete "although not a party to this Plan."

7. Page 54, Section IV.C.3., delete Section IV.C.3.

8. Page 57, line 0, Section IV.E.1., add "treaty" (to make the "treaty tribes").

9. Page 57, Section IV.E.1., line 8, insert "and Shoshone-Bannock" after Indian.

The Shoshone-Bannock Tribes' motion to substitute (#1587) IS DENIED.

IT IS SO ORDERED.

DATED this 7th day of October, 1988.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff, and THE CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION; THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; AND NEZ PERCE TRIBE OF IDAHO, Intervenors, v. STATE OF OREGON, STATE OF WASHINGTON, Defendants. and STATE OF IDAHO and SHOSHONE-BANNOCK TRIBES. Intervenors.	Civil No. 68-513-MA AMENDED OPINION (Intervention)

MARSH, Judge.

The Makah Indian Tribe (hereinafter "Makah Tribe") moves to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a) and alternatively seeks permissive intervention pursuant to Fed. R. Civ. P. 24(b). While its motion to intervene appears to be for the sole purpose of submitting opposition to the pending motion for an order approving the Columbia River Fish Management Plan, the Makah Tribe at oral argument conceded that it wished to intervene as a party for all purposes. The parties moving for an order approving the 1988 Columbia River Management Plan (hereinafter "moving parties") contend the Makah Tribe does not meet the standards for intervention as of right. While the moving parties might not resist limited permissive intervenor status or amicus status, they do contest full intervention whether by right

or permissive. The Yakima Indian Nation offers further opposition. For the reasons that follow, I deny the motion of the Makah Tribe to intervene.

BACKGROUND

The pending case is the outgrowth of consolidation of two cases filed in 1968. The first case was designated Sohappy v. Smith, Civil No. 68-409, while the second was designated by the heading in this case. Each suit was brought against the State of Oregon to define the Indians' treaty right to take fish "at all usual and accustomed places" on the Columbia River and its tributaries. Sohappy v. Smith, 302 F. Supp. 899 (D. Or. 1969). They sought a determination of the extent to which the State of Oregon could regulate fishing after Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968). Four Indian tribes,

including the Yakima Indian Nation, the Confederated Tribes and Bands of the Warm Springs Reservation of Oregon, the Confederated Tribes of the Umatilla Indian Reservation and the Nez Perce Tribe of Idaho, intervened as plaintiffs in the suit brought by the United States. Sohappy, 302 F. Supp. at 899. The two actions were consolidated. Id.[1]

An initial opinion was entered on July 8, 1969 wherein the treaty right of the Indians on the Columbia River and its tributaries was construed. Sohappy v. Smith, 302 F. Supp. at 911-12. Further, the opinion considered the manner and extent to which the State of Oregon could regulate

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[1] The opinion filed today on the motion for adoption of the Columbia River Fish Management Plan provides a further synopsis of the 1988 Plan and the background of this case. For continuity I restate many of the same facts here.

Indian fishing. Id. Jurisdiction was retained to grant further or amended relief. Id. Referring to the retention of jurisdiction, the Ninth Circuit quoted this court as permitting "[a]ny party at any time [t]o apply to the court for a subsequent modification of any provision of this decree where the continued application of the decree has become inequitable or impracticable, but this right shall not affect the finality of the decree with respect to times prior to any such modification." United States v. Oregon, 529 F.2d 570, 572 (9th Cir. 1976).

Between 1969 and 1976 the parties appeared before this court several times. Id. The Honorable Robert C. Belloni urged the adoption of a comprehensive plan for allocation and management of Columbia River anadromous fish. Id.

In 1974 the State of Washington was permitted to intervene. United States v. Oregon, Civ. 68-513 (D. Or. May 22, 1974). In 1977 all the parties to the litigation signed and this court approved "A Plan for Managing Fisheries on Stocks Originating from the Columbia River and its Tributaries above Bonneville Dam" (hereinafter "original Plan"). Id. (February 28, 1977). The original Plan had a term of five years and set conservation goals for each fish species, established fishing regulations and provided for the establishment of future management techniques.

However, the original Plan did not establish fishing locations, times or quotas. United States v. Oregon, 718 F.2d 299, 302 (9th Cir. 1983). These details are regulated through the Columbia River Compact (hereinafter "Compact"), an interstate

agency created by Oregon and Washington and ratified by Congress. Id.; Act of April 8, 1918, Pub. L. No. 64-123, 40 Stat 515 (1918). Under the Compact, the Columbia River is divided into six commercial fishery zones and annually it estimates the size of the runs and determines the length of fishing seasons that the runs can support.

In 1982, two of the tribes gave notice of their intent to withdraw from the original Plan or to renegotiate it. United States v. Oregon, 745 F.2d 550, 552 (9th Cir. 1984). On August 24, 1983 and again on September 6, 1983, this court found that changed circumstances of law and fact made the original Plan subject to revision or modification and ordered the parties to attempt to agree upon a revised or modified agreement. United States v. Oregon, Civ. 68-513 (August 24, 1983; September 6, 1983).

At the August hearing, this court delayed ruling on a pending motion by the State of Idaho to intervene. Later, the motion was denied as untimely and Idaho was granted the right to participate in the case as amicus curiae. Id. (December 5, 1983). The Ninth Circuit reversed this order, held that Idaho's petition to intervene should not have been denied as untimely and allowed Idaho to intervene. United States v. Oregon, 745 F.2d at 553. Specifically, the Ninth Circuit held there had been no objections on the issue of timeliness. The objections of the existing parties were that Idaho's presence might create difficulties if Idaho asserted claims over which the court didn't have jurisdiction. Id. at 552. The Ninth Circuit reasoned that the district court had not made a finding of prejudice to the existing parties and that there wasn't a

"serious" dispute that Idaho had interests which may be affected by the disposition of the litigation. Id.

In 1985 the parties were before the Ninth Circuit again. United States v. Oregon, 769 F.2d 1410 (9th Cir. 1985). The primary issue was this court's finding that the fishery regulations promulgated by the Columbia River Compact violated the Indians' treaty fishing rights and the finding that it was within the jurisdiction of this court to set aside those regulations and adopt the Tribes' proposed seasons by means of an injunction. Id. at 1412. The Ninth Circuit affirmed the actions and jurisdiction of the district court. Id.

Next, the Shoshone-Bannock Tribes moved to intervene. The Shoshone-Bannock Tribes are located in Idaho on the upper Snake River, a tributary to the Columbia River.

On July 25, 1986 this court allowed the Shoshone-Bannock Tribes to intervene.

Pursuant to the August 1983 order, the parties have continued negotiations to reach a comprehensive plan. Since the expiration of the original Plan in 1982 and the subsequent negotiations, the parties have entered into several one year management plans in order to maintain responsible management of Columbia River anadromous fish.

Finally, it should be noted that since the commencement of this action, Congress has passed the Fishery Conservation and Management Act of 1976, 16 U.S.C. § 1801 et seq (Supp. V 1985) (also referred to as "the Magnuson Act"), providing for exclusive fishery management over all fish in a zone extending two hundred miles seaward from a state's boundary. The Pacific Fishery

Management Council (hereinafter "PFMC") was created by the Magnuson Act for the areas seaward of Washington, Oregon and California. 16 U.S.C. § 1852(a)(6); 16 U.S.C. § 1853(a)-(c). The PFMC is composed of representatives from Washington, Oregon, California, Idaho, eight members appointed by the Secretary of Commerce and the regional director of the National Marine Fisheries Service. Id.

The Columbia River Fish Management Plan is an extended management plan (hereinafter "the 1988 Plan" or the "Plan").[2] It was presented to the court by the states of Oregon and Washington, the United States and the Warm Springs, Umatilla and Nez Perce Tribes and the Yakima Indian Nation. The

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[2] I recognize the walleye species, a relatively recent introduction, is a non-anadromous fish and yet allocation of it is now included in the proposed plan.

Shoshone-Bannock Tribes and the State of Idaho object to the 1988 Plan. The Makah Tribe seeks intervention in the motion before me. Further objections to the 1988 Plan, whether in the form of amicus briefs or otherwise, have been filed by the Northwest Gillnetters Association and Columbia River Fisherman's Protective Union and the Washington State Trollers.

DISCUSSION

The Makah Tribe bases its argument for intervention on the contention that a substantial portion of its treaty ocean fishery is comprised of Columbia River salmon runs. The Makah Tribe occupies coastal lands on the northwest tip of the Olympic Peninsula. Its ocean fishery is thus subject to direct regulations by the PFMC, the Secretary of Commerce and the State of Washington. The crux of the Makah

Tribe's argument is that the PFMC is negotiating the terms of management of the fishery resources of the Columbia River and the Makah's efforts to participate in that process have been rejected.

Intervention of Right

Fed. R. Civ. P. 24(a) provides that upon timely application a party shall be permitted to intervene when the applicant claims "an interest relating to the property or transaction which is the subject of the action" and the party is so situated that the "disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a).

In considering intervention as a matter of right, I must consider the timeliness of

the application, the interest that relates to this action, if disposition of the action will impair or impede the ability to protect that interest and whether the interest is adequately represented by existing parties. United States v. Stringfellow, 783 F.2d 821 (9th Cir. 1986) cert. granted in part 106 S.Ct. 2273; cert. dismissed in part 107 S.Ct. 10.

Timeliness

In an earlier appeal of this case, the Ninth Circuit stated that the timeliness requirement for intervention as a matter of right "should be treated more leniently than for permissive intervention because of the likelihood of serious harm." United States v. Oregon, 745 F.2d at 552. In making the consideration the court should look at the stage of the proceedings, the prejudice to the other parties and the reason for and

length of the delay. County of Orange v. Air California, 799 F.2d 535 (9th Cir. 1986); United States v. Oregon, 745 F.2d 550, 552 (9th Cir. 1984).

Here, the Makah Tribe argues that its motion is timely because the filing of the motion for an order approving the 1988 Plan opens a new stage in this litigation, that it couldn't have known of the Plan earlier because it was specifically excluded from the negotiations and that the other parties won't be prejudiced because Idaho objects also.

The moving parties contend the motion is untimely because the negotiations leading to the 1988 Plan have been going on for four and one half years and intervention at this stage would require that the 1988 Plan be renegotiated. Further the moving parties contend intervention would considerably

expand the scope of the case. The moving parties contend the "new stage" is a disingenuous characterization and point out that the Makah Tribe acknowledges that it has been aware of the negotiations. The moving parties also contend that they will be extremely prejudiced because new and materially different issues would be raised precluding the timely and orderly culmination of the negotiation process. The moving parties assert that the Makah Tribe actually seeks status as a full party, not just a limited status. Finally, the moving parties assert that the Makah has not shown a valid basis for its failure to proceed at an earlier stage.

In separate opposition, the Yakima Nation contends that the motion is not timely and the Makah Tribe could have filed it two, five or ten years ago.

Specifically, the Yakima Nation notes that the Makah could have sought intervention in 1983 following the order to prepare a new management plan. Instead, according to the Yakima Nation, the Makah Tribe pursued other litigation. The Yakima Nation also contends that it will be prejudiced by intervention at this late stage because the Makah Tribe seeks to expand the scope of the litigation. In addition, the Yakima Nation fears the court may construe the intervention as a waiver of its sovereign immunity against the Makah Tribe an issue which is pending in other litigation. Finally, the Yakima Nation contends it has spent considerable amounts of money and staff time in enhancing and protecting the habitat and resources of the Columbia River while the Makah Tribe has not participated nor contributed. Now, according to the Yakima Nation, to allow

intervention would impact decisions already made involving all aspects of fishery husbandry on the Columbia River.

I have carefully considered the issue of timeliness and the prior holding of the Ninth Circuit in regard to the motion by the State of Idaho to intervene. I find that the present motion is not timely. The circumstances before me are different than those before the court when Idaho sought intervention. Here, the parties have been negotiating since the original Plan expired in 1982. The contention by the Makah Tribe that this is a new stage is incorrect. This court ordered the parties to negotiate a new plan in 1983. United States v. Oregon, Civ. 68-513 (August 24, 1983). The Makah Tribe's active participation in the companion cases in the United States District Court for the District of Washington and the order by this

court on August 24, 1983 are conclusive evidence of the Makah Tribe's awareness of the status of this action. I feel that the Makah Tribe, if in other respects a proper party, should have sought intervention at that time. However, in light of subsequent rulings in this case, the appropriate time for a motion to intervene by the Makah Tribe would have been within a reasonable time after October 16, 1984, the date that the Ninth Circuit entered its opinion granting Idaho status as an intervenor, or certainly by the time the Shoshone-Bannock Tribes petitioned for intervention in 1986. The Makah Tribe has not offered any reason for its delay in moving to intervene. On the other hand, during that time, the parties have made significant strides in reaching agreement and the moving parties have presented a new 1988 Plan to the Court.

Each portion of the complex Plan reflects concessions made and relates to other portions of the Plan. To allow participation by the Makah Tribe now would require the parties to start negotiating all over again. I find this would significantly prejudice the existing parties.

Interest In Action

The "interest test" is primarily a practical guide to disposing of lawsuits involving as many apparently concerned persons as is compatible with efficiency and due process. County of Fresno v. Andrus, 622 F.2d 436, 439 (9th Cir. 1980) (citations omitted). It is basically a threshold test because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene. Id.

The Makah Tribe's concern is the effect of the 1988 Plan on federal and state regulation of ocean fisheries. The Makah Tribe notes that its ocean fishery is crucial to its economic survival and argues that it possesses a legal right in its treaty-secured fishing rights because runs which are subject to the Plan pass through its usual and accustomed fishing grounds. The Makah Tribe also contends that its interest, being secured by a treaty right, is more substantial than the interest of Idaho. Finally, the Makah Tribe contends that there is no legal significance to the fact that its fishery precedes the in-river fisheries of the parties to the Plan.

The moving parties counter that the Makah Tribe cannot demonstrate that it has an interest adversely affected by the 1988 Plan and that the interest that the Makah

seeks to protect is controlled by the Magnuson Act and should be addressed to the PFMC. The Yakima Nation claims that the Makah's interests are decidedly different than those of Idaho and the Shoshone-Bannock. The first difference it claims is that the Makah Tribe fishes at the "front of the line" before entry into the Columbia system, and secondly, that the Makah's interest is "to make certain that no in-river planning results in any decisions which might constrain Makah's ocean interceptions."

The first inquiry in assessing the interest of the Makah Tribe is to consider the interests that are at issue in this action. The original pleadings and Judge Belloni's first opinion disclose that the purpose of the action is to define the treaty rights of the original parties "of

taking fish at all usual and accustomed places" on the Columbia River and its tributaries and the extent to which the State of Oregon is able to regulate Indian fishing. Here, the Makah Tribe seeks to protect its interest in ocean fishing. This is not the same interest that the action was intended to address.

The uniqueness of the problems associated with this case lies in the nature of the fish the parties attempt to manage. The anadromous fish, by whatever system controls it, is a fish which is hatched in fresh water, is able to adapt to seawater, and thus migrate to sea to reach maturity. It then returns, reversing the conversion process by adapting back to fresh water to spawn, thereby starting the cycle over again. To complicate matters, some of the species such as steelhead can repeat this

process while others such as salmon make the course but once.

All stages of this migration cycle are necessary to the continue procreation of the anadromous fish. Therefore, by affecting one stage of the cycle, all stages are affected. The Makah Tribe, therefore can rightfully contend that decisions made concerning what will happen upstream from the mouth of the Columbia River may in some way affect them. However, this very aspect of possible individual interests strikes against intervention.

To expand this action to protect the interest of the Makah Tribe would invite motions for intervention by all tribes, individuals and entities with interest in ocean fisheries of anadromous fish. I envision that other tribes from Washington, Canada and Alaska would seek intervention.

Then the sportsfishermen of Washington, Canada and Alaska would seek intervention. Perhaps the commercial fishermen of anadromous fish in those areas would be next. It is not inconceivable that fishermen of non-anadromous fish would seek intervention as this action was allegedly affecting their fishing privileges also. Clearly, this action cannot become a forum for west coast ocean fishing, let alone the entire Pacific Rim past which these marvelous fish migrate. The mouth of the Columbia is a definite and appropriate place downstream to hold the line against further intervention.

I am not unmindful that Section I A 5 of the 1988 Plan refers to ocean fisheries. However, my acceptance of the Plan insofar as it relates to that provision, or any other relating to ocean fisheries, would be

to restrict its application to the indirect effect the actions of the Compact may have in relation to its recommendations to the PFMC. In other words, I do not feel the Plan as proposed overlaps or usurps the authority of the PFMC under the Magnuson Act, as Section I B 6 of the 1988 Plan specifically recognizes the preemptive authority of acts of Congress. The parties have indicated that they recognize the limits of the agreement.

I note that although the ocean fishing of the Makah Tribe is to some extent affected by this action, the effect is indirect. The direct effect on the Makah Tribe's ocean fishing comes from the policies set by the PFMC through the Magnuson Act and the Compact. The PFMC, charged with management of the ocean fisheries, properly notices the actions of

the Compact and others in the management of the Columbia source. The several parties represented here include members of the Compact and the government which is charged with the responsibility to protect tribal rights of coast Indians. The Makah Tribe has had access to the PFMC and has taken its disputes to the federal courts in the Western District of Washington. It asserts that it needs a voice here as well because the PFMC is too affected by the decisions made by the Compact and those associated with this litigation.

I believe its rights are more appropriately addressed in the forum created by Congress under the Magnuson Act. A different result would attempt to expand jurisdiction far past the present complexity of the case into areas directly addressed by Congress. While the Ninth Circuit has held

that this court had the power to enjoin the Compact when its actions affected the fishing rights of the in-river tribes, this power is after the fact. United States v. Oregon, 769 F.2d at 1417. Thus, if the Compact infringes on the in-river Tribes, the court affords equitable relief. I do not feel it is within the scope of this litigation to take action that may infringe upon the Compact or PFMC before the fact.

Further, I am not persuaded by the recent decision in Makah Indian Tribe v. Verity wherein the action was dismissed for failure to join absent Indian tribes, arguably including Columbia River tribes, as indispensable parties. Makah Indian Tribe v. Verity, C87-747RC (W.D. Wash. May 16, 1988). Whether or not the Makah Tribe included all the necessary parties in another action does not persuade me to

expand the scope of this litigation.

Thus, I find that the interest the Makah Tribe seeks to protect is the indirect effect of this court's actions. When I consider that interest in light of the scope of this action, the treaty fishing rights on the Columbia River, I must find that the interest of the Makah Tribe in this action does not pass the threshold test.

Impairment

The Makah Tribe contends that its interest will be impaired as a practical matter because adoption of the 1988 Plan will constrain the United States and the State of Washington in subsequent management of ocean fisheries. The moving parties contend that the Makah cannot demonstrate that the 1988 Plan adversely affects its ability to protect its interest before the PFMC and the Secretary of Commerce. The

Yakima Nation contends that the Makah fails to establish that its interests are prejudiced by the 1988 Plan and also contends that its interests are protectable by the PFMC.

As stated above, I find the ramifications of this proceeding upon the Makah Tribe are indirect. Exclusive and direct regulation of ocean fisheries is controlled by the Magnuson Act and in this region by the PFMC. Indirect regulation is by the Compact. Challenges to the PFMC or the Compact should first be addressed to those agencies. Challenges to the actions of the PFMC or the Compact as to regulation of anadromous fish within the Columbia River may be appropriate before this court after all other remedies are exhausted. United States. v. Oregon, 769 F.2d at 1417. However, challenges to the actions of the

PFMC or the Compact with regards to ocean fisheries are beyond the scope of this litigation. Thus I find that the impairment, if any, on the interest of the Makah Tribe as a result of this action would be indirect and beyond the scope of this litigation.

Representation of Interest by Other Parties.

Although the discussion above makes it unnecessary to determine adequacy of representation, the import of this case persuades me to address this issue as well.

In considering whether a would-be intervenor is adequately protected, the court must consider whether (1) the interest of a party present to the suit is such that it will undoubtedly make all of the intervenor's arguments, (2) the present party is capable of and willing to make such

arguments, and (3) the intervenor would not offer any necessary element to the proceedings that the other parties would neglect. County of Fresno, 622 F.2d 436, 438-9 (9th Cir. 1980). The Ninth Circuit has noted that the interest test is "primarily a practical guide to disposing of lawsuits" and that Fed. R. Civ. P. 24 is given a liberal construction in favor of applications for intervention. Waller v. Financial Corp. of America, 828 F.2d 575 (9th Cir. 1987) (citations omitted).

The Makah Tribe contends that no other party represents its interests. The Makah Tribe contends that the United States has a trust responsibility to them which it allegedly breached through the secret negotiations excluding the Makah Tribe. The Makah Tribe notes that the State of Idaho, although opposing the Plan, has distinct

interests from the Makah Tribe because Idaho's interests lie in the terminal areas. These interests, it contends, are different from the Makah's interest in the ocean treaty fisheries. The Makah Tribe does not address how its interests are different from that of the other tribes.

The moving parties note that the Makah Tribe does not have a treaty right to fish in the Columbia River. Its treaty right is to harvest fish in the Pacific Ocean including some fish bound for the Columbia River. Thus, the Makah's treaty right is to a fishery that precedes the in-river fisheries which are a part of the Plan. However, even considering this interest, the moving parties contend that the Makahs do not have a legally protectable interest in this litigation which needs additional representation.

I have considered the representation of interests by the various parties. I do not find evidence of any breach by the United States of its trust responsibility to the Makah Tribe. Further, I find that the alleged interest of the Makah Tribe arises from its treaty right in ocean fisheries, not in a treaty right in the Columbia River fisheries which are involved in this action. To the extent the Makah Tribe has an interest in anadromous fish spawned in the Columbia system and returning thereto, its interest is represented by all the parties to this case, all of whom are interested in preservation and enhancement of the Columbia River fish production. It is significant that this case was initiated by the United States to protect and preserve Indian rights by proper management of fish runs in recognition of those rights. Indirectly,

the Makah Tribe is the beneficiary of that action.

Conclusion

After considering all the factors as directed by the Ninth Circuit, I do not find that the Makah Tribe should be granted status as an intervenor. First, I found the motion was not timely as it would have been had it been raised shortly after Idaho or the Shoshone-Bannock were allowed to intervene. This tardiness would cause severe prejudice to the parties as they have been negotiating terms of the 1988 Plan for over four years. Next, I find that the interest the Makah Tribe seeks to protect is not the same interest that is the basis of this lawsuit. The Makah Tribe's treaty right is different and is only indirectly affected, if at all, by the outcome of this litigation. The analysis relating to

impairment of the Makah Tribe's treaty right is the same. In addition, I have found that the interests of the Makah Tribe are already being protected by the United States and the other parties in the case.

Finally, I have considered the possibility of limiting the participation by the Makah Tribe in this action. I find no appropriate way in which to do this. To allow participation to the extent of objecting to the 1988 Plan is the same as allowing full participation. Although I might restrict the Makah Tribe from relitigating issues that previously have been decided, I cannot limit its participation in any meaningful way.

Permissive Intervention

Alternatively the Makah Tribe asks that it be permitted to intervene pursuant to Fed. R. Civ. P. 24(b). This rule provides

that upon timely application, anyone may be permitted to intervene when an applicant's claim or defense and the main action have question of law or fact in common. Permissive intervention is granted in the court's discretion. The rule provides that, in exercising discretion, the court "shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b).

Here, the Makah Tribe submits its proposed opposition to the management plan and contends that common questions of law of fact exist. As Idaho is already opposing the motion, the Makah Tribe contends that its intervention won't unduly delay or prejudice the other parties. The moving parties note that unlimited intervention might significantly delay or impede approval

and implementation of the Plan. Although the moving parties don't oppose limited permissive intervention or amicus status, they propose that intervention by the Makah Tribe should not alter the focus this litigation has held since its inception. The moving parties note that the focus has been to define the rights of the plaintiff tribes to harvest a specific share of the fish in their usual and accustomed places and the authority of Oregon and Washington to regulate those tribes' fishing activities in that part of the mainstem Columbia River where the tribal fishery has been concentrated.

I have considered the appropriateness of permissive intervention by the Makah Tribe. I do not find this to be an appropriate situation in which to grant permissive intervention. First, I find the

motion untimely for the same reasons considered above in the motion based on a right to intervention. Second, I note that the delay that might occur is not a delay in objecting and hearing objections to the 1988 Plan, but rather the delay would be in trying to reopen negotiations of the Plan. The Plan is a complex, sensitively balanced document that was derived following more than four years of negotiation. To renegotiate and allow the Makah Tribe complete participation would be a serious prejudice to the participating parties. Further, the Makah Tribe has not demonstrated anything to indicate such a renegotiation would be fruitful. Thus, I find to grant status as a permissive intervenor to the Makah Tribe would unduly delay the proffered implementation of the 1988 Plan and would prejudice the

adjudication of the rights of the original parties. I cannot do this in light of the indirect effect this litigation may have on the rights of the Makah Tribe. Attention is directed to the opinion filed this date relating to the adoption of the Columbia River Fish Management Plan. Although the Makah Tribe did not request amicus status, the issues raised in its brief in opposition to the 1988 Plan were considered along with amicus briefs.

CONCLUSION

The Makah Tribe's motion to intervene as of right or alternatively for permissive intervention is denied.

DATED this 7th day of October, 1988.

/s/ Malcolm F. Marsh
Malcolm F. Marsh
United States District Judge

D-1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION, et al.; CONFEDERATED TRIBES & BANDS OF THE YAKIMA INDIAN NATION; CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION; NEZ PERCE INDIANS, Intervenors-Appellees, STATE OF IDAHO, SHOSHONE-BANNOCK TRIBE, Intervenors-Appellants, MAKAH INDIAN TRIBE, Applicant in Intervention Appellant, v. STATE OF OREGON, STATE OF WASHINGTON, Defenants-Appellees.	C.A. Nos. 88-4311 88-4316 88-4347 D.C. No. CV68-513-MA ORDER

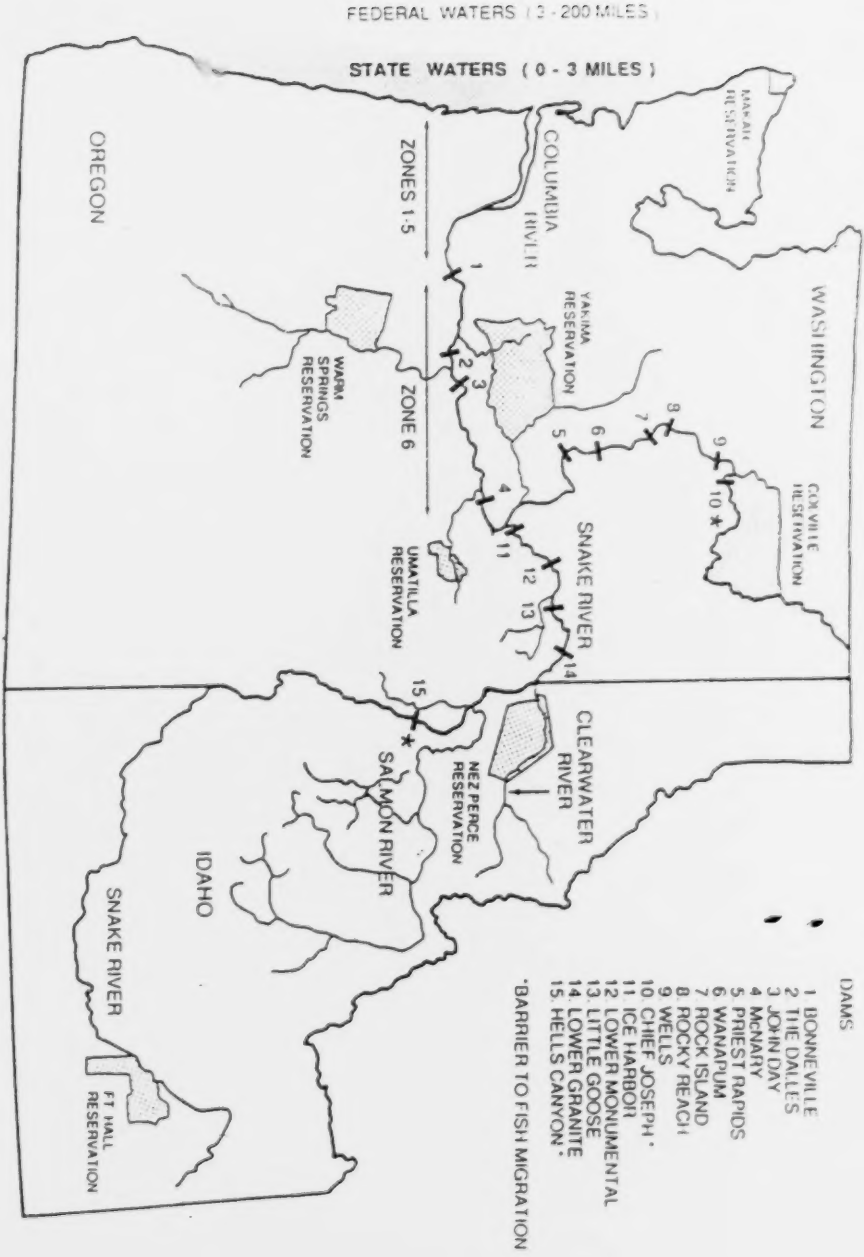
Before: BROWNING, BEEZER and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

[Filed: January 11, 1991, Clerk, U.S. Court of Appeals]



SOURCE: U.S. v. Oregon, Ninth Circuit No. 88-4316, Joint Brief of Appellee Indian Tribes and States (Oct. 18, 1989).

(2)

No. 90-1595

Supreme Court, U.S.
FILED
JUN 6 1991
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

MAKAH INDIAN TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioner Makah Indian Tribe sought to intervene in this complex fishing-rights litigation, in which the district court entered its judgment in 1969, after a proposed agreement to implement certain portions of the judgment had been negotiated and presented to the district court. The question presented is:

Whether the district court abused its discretion by denying petitioner's motion to intervene on the ground that it was untimely.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1595

MAKAH INDIAN TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A59) is reported at 913 F.2d 576. The opinion of the district court denying petitioner's motion to intervene (Pet. App. C1-C40) is reported at 122 F.R.D. 571. The opinion of the district court sustaining the fishery management plan on the merits is reported at 699 F. Supp. 1456.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1990. The petition for rehearing was denied on January 11, 1991. Pet. App. D1-D2. The petition for a writ of certiorari was filed on April 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The district court entered its judgment in this complex fishing-rights case in 1969, broadly declaring the treaty rights of four Indian tribes to take fish from usual and accustomed places on the Columbia River and limiting the authority of the State of Oregon to regulate such fishing. In 1988, petitioner, an Indian tribe that neither takes fish from locations along the Columbia River or its tributaries nor claims any treaty right to do so, moved to intervene. Pet. App. C2-C3. Its motion was filed only after the United States, the States of Oregon and Washington, and the four Indian tribes had submitted to the district court for approval a Columbia River fish management plan to implement the judgment. Pet. App. C4. The plan had been under negotiation among the respondents since 1983, and petitioner knew of those negotiations since at least 1984. Pet. App. C18-C19. The court of appeals held that the district court did not abuse its discretion in denying petitioner's motion to intervene as untimely (Pet. App. A56-A57), and the district court further held that intervention was not warranted in any event because petitioner has no interest directly affected by the plan or this case. Pet. App. C35.

1. a. Petitioner occupies a reservation on the northwest point of the Olympic Peninsula in the State of Washington (see Pet. App. E1 (map)) and holds a right secured by treaty to take fish in an area of the Pacific Ocean extending seaward from the Washington coastline.[1] The part of petitioner's

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[1] The right of petitioner's members to fish in this area is derived from Article IV of the Treaty with the Makah Tribe of Jan. 31, 1855, 12 Stat. 940, as construed and applied in

ocean fishery that lies three or more miles seaward of the coast is subject to federal regulations promulgated by the Secretary of Commerce pursuant to the Fishery Conservation and Management Act of 1976 (Magnuson Act), 16 U.S.C. 1801 *et seq.* See § 304, 16 U.S.C. 1854; Pet. App. A6-A7, C10-C11. The Secretary adopts those regulations after receiving the recommendation of the Pacific Fishery Management Council (PFMC), which is established by Section 302(a)(6) of the Magnuson Act, 16 U.S.C. 1852(a)(6), to formulate management measures for ocean fisheries within the 197-mile "exclusive economic zone" that lies between 3 and 200 miles seaward of the coast of Washington, Oregon, and California. The PFMC has 13 voting members, including the state fishery management official from each of the three coastal States plus Idaho, a regional director of the National Marine Fisheries Service in the Commerce Department's National Oceanic and Atmospheric Administration, one representative of Indian tribes having a right to take fish from the ocean, and eight at-large members appointed by the Secretary of Commerce from among nominees submitted by the governors of the four States. See *Makah Indian Tribe* v. *Verity*, 910 F.2d 555, 556-557 (9th Cir. 1990); *Washington Crab Producers, Inc.* v. *Mosbacher*, 924 F.2d 1438, 1441 (9th Cir. 1991).

The area of petitioner's ocean treaty fishery between the Washington coast and three miles seaward is subject to tribal and limited state regulation.

United States v. *Washington*, 626 F. Supp. 1405, 1466-1468 (W.D. Wash. 1982), aff'd, 730 F.2d 1314, 1318 (9th Cir. 1984).

That portion of the fishery is also subject to the jurisdiction of the United States District Court for the Western District of Washington in *United States* v. *Washington*, Civil No. 9213, a complex fishing-rights case to which petitioner is a party. See *United States* v. *Washington*, 384 F.Supp. 312, 363-365, 400, 406 (W.D. Wash. 1974), aff'd and modified, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 662 n.2, 663 n.3, 664, 670 n.15 (1979); Pet. App. A5-A6; *Washington Crab Producers, Inc.* v. *Mosbacher*, 924 F.2d at 1442.

Petitioner has never claimed a treaty right to take fish from the Columbia River or its tributaries. However, fish harvested by petitioner's members from the ocean include anadromous species that are born in inland waters of the Columbia River System, migrate to the ocean, and, after reaching maturity, migrate back to their inland places of origin to spawn. See *Idaho ex rel. Evans* v. *Oregon*, 462 U.S. 1017, 1019-1020 (1983).

b. The instant case, styled *United States* v. *Oregon*, was commenced in 1968 in the United States District Court for the District of Oregon. Pet. App. C1-C3. In 1969, the district court entered a declaratory judgment in favor of the United States and four Indian tribes,[2] holding that the tribes have rights protected by treaty to take fish from usual and accus-

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[2] The four tribes, respondents herein, are the Confederated Tribes of the Warm Springs Reservation of Oregon; the Confederated Tribes of the Umatilla Indian Reservation in Oregon; the Confederated Tribes and Bands of the Yakima Indian Nation in Washington; and the Nez Perce Tribe in Idaho.

tomed places on the Columbia River and its tributaries and that the State of Oregon has only limited regulatory authority as regards those treaty rights. *Sohappy* v. *Smith*, 302 F. Supp. 899 (D. Or. 1969). That judgment was never appealed. The district court retained jurisdiction to permit future enforcement or modification of the judgment. Pet. App. C5.[3]

The States of Washington and Idaho were granted leave to intervene in this case in 1974 and 1984, respectively. See *Sohappy* v. *Smith*, 529 F.2d at 572; *United States* v. *Oregon*, 745 F.2d at 553; Pet. App. C6, C8. In 1986, respondent Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho were granted leave to intervene because they claimed interests in upriver fisheries of the Snake River (the major tributary of the Columbia River) and the Snake's tributaries, although those rights have never been judicially defined. Pet. App. A37-A38, C9-C10.[4]

2. a. Since entry of the judgment in 1969, respondents and the district court have undertaken to apply its requirements to each run of migrating fish entering the Columbia River System. Pet. App. A4-A5. At the court's urging, respondents attempted to design a comprehensive in-river fish management plan, subject to periodic approval by the court, for each seasonal run. In 1977, respondents agreed to a plan for the Columbia River. After that plan expired, the district court, in September 1983, ordered

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[3] Post-judgment orders have been the subject of five prior appellate decisions, reported as *Sohappy* v. *Smith*, 529 F.2d 570 (9th Cir. 1976), and *United States* v. *Oregon*, 657 F.2d 1009 (9th Cir. 1981); 718 F.2d 299 (9th Cir. 1983); 745 F.2d 550 (9th Cir. 1984); and 769 F.2d 1410 (9th Cir. 1985).

[4] The Confederated Tribes of the Colville Reservation were permitted to intervene in 1989. See Pet. 9.

respondents to negotiate a new comprehensive management plan and to submit either an agreed plan or alternative plans for approval by the court. Since at least 1984, representatives of petitioner were aware of the status of the case and the pendency of the negotiations, but petitioner did not seek to intervene while they were in progress. See Pet. App. C18-C19; Pet. C.A. Br. 30; Resp. Tribes and States Jt. C.A. Br. 18.

b. In early 1988, representatives of the United States, the four Columbia River tribes, and the States of Oregon and Washington signed the 1988 Columbia River Fish Management Plan, which for most purposes has a ten-year duration. The 74-page Plan establishes a comprehensive organizational and procedural framework to manage (through the mechanism of annual negotiations among federal, state, and tribal fishery management entities) the propagation, allocation, harvest, and conservation of anadromous fish runs within the Columbia River System for the benefit of treaty Indian fisheries and non-Indian fisheries. In March 1988, the Plan signatories filed a joint motion in the district court for approval of the Plan. Pet. App. C11-C12.

3. a. After the Plan was submitted to the district court, petitioner filed a motion for intervention as of right under Fed. R. Civ. P. 24(a)(2) and for permissive intervention under Fed. R. Civ. P. 24(b), and it presented a proposed brief opposing the Plan.[5]

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[5] Petitioner requested the court either to disapprove the Plan or to stay its decision pending the outcome of a separate case brought by petitioner, *Makah Indian Tribe* v. *Baldrige*, Civil No. C87-747-RC (W.D. Wash.), in which petitioner challenged the regulations adopted by the Secretary of Commerce under the Magnuson Act to allocate the ocean harvest

The signatories did not oppose granting petitioner limited permissive intervention or amicus status for purposes of objecting to the Plan, but they opposed granting it full-fledged party status. The court denied intervention, finding, *inter alia*, no appropriate way to limit petitioner's participation. The court did, however, leave open the possibility of judicial relief after petitioner exhausted its remedies under the Magnuson Act. Pet. App. C13-C20, C30, C36, C38-C40.

The court first concluded that petitioner's motion was untimely. It reasoned that the submission of the 1988 Plan for approval did not constitute a new stage of the case, because the parties had engaged in negotiations since the original plan expired in 1982 and the court had ordered the parties to negotiate a new plan in 1983. The court found that petitioner was aware of those negotiations and should have moved to intervene within a reasonable time after Idaho was permitted to intervene in 1984, or at least after the Shoshone-Bannock Tribes were permitted to intervene in 1986. Finally, the court noted that petitioner

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of migrating Columbia River Salmon for 1987. The district court subsequently dismissed that suit because of the absence of the 23 Indian tribes having fishing rights in Puget Sound, the Columbia River, and the ocean fishery, which could not be joined because of tribal sovereign immunity. On petitioner's appeal, the court of appeals affirmed in part and reversed in part, holding that the district court had properly dismissed the case insofar as petitioner challenged the quota for 1987, but that the action could proceed insofar as petitioner challenged the procedures adopted by the Secretary in promulgating the regulations. *Makah Indian Tribe* v. *Verity*, 910 F.2d 555 (9th Cir. 1990); see pp. 20-22, *infra*. *Verity* was decided by the same panel that rendered the decision that is the subject of the instant petition, but petitioner elected not to seek review in *Verity*.

offered no reason for its delay in moving to intervene, while during that period of delay, the parties had made "significant strides" in agreeing to the Plan before the court. To allow petitioner to intervene, the court concluded, "would require the parties to start negotiating all over again," which "would significantly prejudice the existing parties." Pet. App. C18-C20.

The district court did not rest its denial of intervention on untimeliness grounds alone. It also found that petitioner's interest in the ocean fishery would not be directly affected or impaired by operation of the 1988 Plan, noting that petitioner's "interest * * * arises from its treaty right in ocean fisheries, not in a treaty right in the Columbia River fisheries which are involved in this action." Pet. App. C34. The court recognized that petitioner's ocean treaty right includes the right to harvest "some fish bound for the Columbia River," *id.* at C33, and that "decisions made concerning what will happen upstream from the mouth of the Columbia River may in some way affect" petitioner's ocean fishery. *Id.* at C24. However, in the court's view, "this very aspect of possible individual interests strikes against intervention." *Ibid.* The court explained that this case has been limited t issues concerning the taking of fish from the Columbia River System itself, and to adjudicate petitioner's interests in taking fish from the Pacific Ocean would invite intervention by other tribes from Washington, Canada and Alaska, as well as commercial and sports fishermen, having an interest in taking fish from the ocean, and would greatly expand the scope of this case. *Id.* at C24-C25.

The court further reasoned that any effects on Pacific Ocean fisheries resulting from in-river management decisions made pursuant to the 1988 Plan

are indirect, because "[e]xclusive and direct regulation of [Pacific O]cean fisheries is controlled by the Magnuson Act," through the Commerce Department and the Pacific Fishery Management Council. Pet. App. C30. The court reasoned that any challenges to such direct regulation of the ocean fisheries by the Commerce Department, or to any possible indirect regulation by the Oregon-Washington Compact Commission,[6] "should first be addressed to those agencies." *Ibid.* Because challenges to agency actions "with regards to ocean fisheries are beyond the scope of this litigation," Pet. App. C31, they normally would have to be pursued in a separate case. However, the court left open the possibility that challenges to actions of the Commerce Department or the Compact Commission "may be appropriate before [the district] Court," but only "after all other remedies are exhausted." *Id.* at C30.

b. The district court also approved the 1988 Plan as modified, Pet. App. B2-B3, for reasons explained in a separate opinion, *United States* v. *Oregon*, 699 F. Supp. 1456 (D. Or. 1988). In that separate opinion, the court specifically addressed and rejected not only the objections of Idaho and the Shoshone-Bannock Tribes, but also the objections of petitioner and other amici curiae. 699 F. Supp. at 1461, 1468-1469; see also Pet. App. A58, C40.[7]

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[6] Oregon and Washington are parties to the Oregon-Washington Columbia River Fish Compact, Act of Apr. 8, 1918, ch. 47, 40 Stat. 515, which provides a system to assure uniformity in regulation of the fish resources by both States on the interstate portion of the Columbia River's mainstream from the River's mouth to its confluence with the Snake River.

[7] The court rejected petitioner's contention that the 1988 Plan violated the Magnuson Act and its treaty right to take

4. On petitioner's appeal, the court of appeals affirmed the district court's denial of petitioner's motion to intervene solely on the ground that the motion was untimely. Pet. App. A44-A57. In the consolidated appeal by Idaho and the Shoshone-Bannock Tribes, the court of appeals also affirmed the district court's rejection of their objections to the Plan on the merits. Pet. App. A9-A44, A59. Idaho and the Shoshone-Bannock Tribes have not sought review of that holding approving the Plan. The court of appeals did not review petitioner's substantive objections to the 1988 Plan, which had been considered and rejected by the district court, because petitioner's "status is similar to that of an amicus curiae," who "may not appeal the [district] court's decision." Pet. App. A58.

In this Court, petitioner no longer seeks review of the denial of intervention for purposes of opposing the district court's approval of the 1988 Plan, and it has abandoned its objections to the Plan. See Pet. 23-24, 51 n.37.[8] It now seeks intervention principally to participate in future annual negotiations *under* the Plan (Pet. 23-24).

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fish from the ocean, noting that this action is restricted to rights to take fish from the Columbia River. The court also rejected petitioner's contentions that the United States' participation in the Plan violated its trust responsibilities to petitioner and that an environmental impact statement should have been prepared in connection with the Plan. 699 F. Supp. at 1468-1469.

[8] In its petition for rehearing (at 1 n.1) in the court of appeals, petitioner for the first time abandoned its objections to the Plan and sought to limit its intervention to subsequent proceedings in the case. See Pet. 23-24. Petitioner's opening brief had requested the court of appeals to "reverse the [district court's] order approving the Plan" (Pet. C.A. Br. 51).

ARGUMENT

The court of appeals correctly held that the district court did not abuse its discretion in denying petitioner's motion to intervene in this case on the ground that the motion was untimely. That fact-bound determination, in the context of this complex case, does not warrant review by this Court, especially since participation by petitioner to advance its interests in taking fish from the Pacific Ocean would greatly expand the scope of this case. As the courts below held, and as petitioner does not dispute, petitioner's ocean fishery is instead subject to direct and exclusive regulation by the Secretary of Commerce under the Magnuson Act. Petitioner objects that the court of appeals, in affirming the district court's ruling that its motion to intervene was untimely, did not consider a factor that has been considered by some other courts of appeals—namely, possible prejudice to the applicant if intervention is denied. However, petitioner did not raise that issue in the court of appeals by requesting that court to include an additional factor in its timeliness determination, and the district court in any event found that petitioner's interests would not be impaired by the denial of intervention. Petitioner's belated effort to interject that issue into this case therefore does not warrant this Court's review.

1. If a motion to intervene is untimely, as petitioner's motion was held to be by the courts below, it "must be denied" under Fed. R. Civ. P. 24. *NAACP* v. *New York*, 413 U.S. 345, 365 (1973). A district court's determination on the question of timeliness will not be disturbed on review unless it constitutes an abuse of discretion. *Id.* at 366. Here, as the court

of appeals held, the district court did not abuse its discretion in finding petitioner's motion untimely.

In accordance with established Ninth Circuit precedent, including its decision on a prior appeal in this case involving Idaho's motion to intervene, the court of appeals considered "three criteria to evaluate timeliness: the stage of the proceeding, prejudice to other parties, and the reason for and length of the delay." Pet. App. A48 (citing *United States* v. *Oregon*, 745 F.2d at 552). The court acknowledged that although this action has been underway for almost 20 years, the length of time that has passed is not alone dispositive. Nevertheless, as the court recognized, petitioner's motion was extremely belated. Pet. App. A48-A52.

This is not an instance in which the applicant requested intervention at the *beginning* of the remedial stage of a case. Pet. App. A48-A50. Petitioner sought to intervene 19 years after judgment was entered; after the parties had already operated under one fishery management plan, had been ordered by the district court to negotiate another such plan, and had conducted such negotiations over a five-year period; and after the Plan agreed to by the United States, the States of Oregon and Washington, and the four Columbia River tribes had been submitted to the court for its approval. As both courts below concluded, the existing parties would have been seriously prejudiced if petitioner had been permitted to intervene, because its challenges could have upset the delicate balance reflected in the complex and carefully negotiated Plan. *Id.* at A48, A52-A54, C19-C20.

Petitioner now insists (Pet. 47-48) that the parties' efforts in negotiating the Plan, and obtaining

judicial approval of it, would not be upset if petitioner's intervention were limited to future participation in the case, and specifically to participation in negotiations under the Plan. As the court of appeals pointed out (Pet. App. A51), however, petitioner did not request such limited intervention in the district court, and the district court concluded that limited intervention was not feasible. Indeed, petitioner did not abandon its efforts to intervene to oppose the Plan until after the court of appeals rendered its decision. See Pet. 23-24. The courts below therefore cannot be faulted for failing to approve the narrower scope of intervention petitioner is now prepared to accept.

Furthermore, the basis for petitioner's participation (protection of its interest in taking fish from the Pacific Ocean) would have greatly expanded the geographic scope of the litigation. In fact, to the extent petitioner once sought to intervene in this case in order to obtain an adjudication and protection of its treaty right vis-a-vis the rights of the four Columbia River tribes, petitioner in effect sought to require the United States to convert this action into one brought by the United States on behalf of petitioner to protect its ocean fishery, or to overcome the sovereign immunity of the United States and the Columbia River tribes in order to accomplish such an adjudication over their objections. Such an expansion of the suit might have required joinder of others having an interest in fishing in the Pacific Ocean as well. As the court of appeals observed, "[t]he district court concluded that at this stage, it is too late in the proceeding to change the nature of the suit so dramatically," and "[i]n light of the district court's discretion to control the course of proceedings before

it, this decision was not an abuse of discretion." Pet. App. A52 (citation omitted). That is especially so because Congress enacted the Magnuson Act in 1976, after the judgment in this case was entered in 1969, to place ocean fisheries under a different regulatory mechanism.[9]

It presumably is for these reasons that petitioner has abandoned any effort to intervene to challenge the 1988 Plan, which simply implements the judgment declaring the in-river fishing rights of the other tribes. But because the 1988 Plan itself rests on the premise that the scope of this case is limited to the taking of fish from the Columbia River System—and because petitioner's fishing rights lie outside that System—it would be particularly odd, in view of petioner's acquiescence in the holding below that it may not intervene to challenge the Plan, to find that petioner nevertheless has a right to intervene to participate in *implementing* the Plan.[10]

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[9] The court of appeals correctly noted that the proposed intervention by petitioner was readily distinguishable from the intervention by Idaho, the Shoshone-Bannock Tribes, and the Colville Tribes, which did not alter the geographic scope of the litigation. Pet. App. A51-A52. Contrary to petitioner's assertion (Pet. 51-53), the necessary expansion of the geographic scope of the case is not a factor unrelated to the timeliness of intervention. The greater the passage of time since entry of the original decree, during which the parties adjusted to and operated under provisions of limited geographic reach, the less basis there is for disturbing those established patterns of judicial administration and related governmental regulation.

[10] In any event, the Plan does not preclude participation by petitioner. For example, in the Plan section governing fall chinook salmon (§ II.I.5.), upon which petitioner relies (Pet. 16-17), the Plan contemplates conferral and agreement among "management entities" with respect to ocean and in-river fish-

Finally, because petitioner offered no explanation for its delay in seeking intervention, Pet. App. C19, the district court plainly did not abuse its discretion in finding that the third of the factors relevant to the timeliness inquiry—the reason for and length of the applicant's delay—weighed against intervention. *Id.* at C20. In the court of appeals, petitioner sought to correct this defect by arguing that it did not know that its interests would be affected by the proceedings in this case. See *Id.* at A54. This argument is unavailing. In the first place, petitioner is *not* significantly affected by this case, because its interests are in taking fish from the Pacific Ocean, not the Columbia River System, and, as petitioner concedes (Pet. 19-20), the courts below made clear that the Secretary of Commerce is not bound by proceedings in this case in setting ocean-fishing quotas under the Magnuson Act. The district court expressly rejected the notion that the 1988 Plan "overlaps or usurps the authority of the PFMC under the Magnuson Act, as Section I B 6 of the 1988 Plan specifically recognizes the preemptive authority of acts of Congress," and it pointed out that "[t]he parties have indicated that they recognize [these] limits of the agreement." Pet. App. C26; see *id.* at A47 (court of appeals notes

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ing regimes. Insofar as ocean fishing is concerned, the term "management entities" encompasses petitioner, as part of the negotiation process leading to the formulation of the PFMC's recommendations to the Secretary of Commerce under the Magnuson Act. In addition, the Plan provides for distribution to such management entities of materials and reports developed by advisory committees established under the Plan. See Gov't C.A. App. 23-24; Resp. Tribes and States Jt. C.A. Br. 34-35.

district court's holding that "the plan does not bind the federal officials").[11]

Second, to whatever extent petitioner's interests may be indirectly affected—because the PFMC will take into account actions proposed by management entities responsible for implementing the 1988 Plan (see Pet. 14-17), or because those management entities in turn will evaluate the ocean fisheries as well as the in-river fisheries—the district court found that petitioner was aware of the status of this case and the negotiations as early as 1983. Pet. App. C18-C19. The court of appeals sustained that finding, noting that interim plans adopted prior to 1988 referred to ocean fisheries as well as in-river fisheries, that petitioner had made repeated inquiries about the negotiations, and that although petitioner claimed on appeal that it had been deceived about their scope, it had not raised that argument before the district court. *Id.* at A55-A56. That fact-bound ruling does not warrant review by this Court.

2. Petitioner contends (Pet. 24-40) that in deciding whether the motion to intervene was untimely, the court of appeals should have considered a factor in addition to the stage of the proceedings, prejudice to existing parties that would result from petitioner's intervention, and the reasons for and length of petitioner's delay in seeking intervention—namely, the extent to which petitioner's interests would be prejudiced if intervention was denied. Petitioner urges the Court to grant certiorari to resolve a circuit conflict

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[11] Because petitioner is not legally bound by any actions taken in this case, *Martin* v. *Wilks*, 490 U.S. 755 (1989), on which petitioner relies (Pet. 54-58), is of no relevance. *Martin* v. *Wilks* did not address the question of when an attempt to intervene should be regarded as untimely.

on the question whether prejudice to the applicant should also be considered. *Ibid.* The asserted circuit conflict may be more apparent than real, but it does not in any event warrant review in this case.

In recent decisions this Court has declined to review, the Third, Fourth, and Eighth Circuits have considered essentially the same three factors upon which the court below relied. *Donovan* v. *United Steelworkers*, 721 F.2d 126, 127 (3d Cir. 1983), cert. denied, 467 U.S. 1252 (1984); *Gould* v. *Alleco*, 883 F.2d 281, 286 (4th Cir. 1989), cert. denied, 110 S. Ct. 870 (1990); *Jenkins by Agyei* v. *Missouri*, 855 F.2d 1295, 1316-1318 (8th Cir. 1988), cert. denied, 490 U.S. 1034 (1989) (as explained in *Missouri* v. *Jenkins*, 110 S. Ct. 1651, 1659-1660 (1990)). Five other Circuits have, in addition, considered prejudice to the would-be intervenor—a factor identified in *Stallworth* v. *Monsanto Co.*, 558 F.2d 257, 264-266 (5th Cir. 1977). But although *Stallworth* held that the intervention request was timely, its holding, based on the application of other factors, made it unnecessary to consider the additional factor petitioner urges. 558 F.2d at 267. See also *Jones* v. *Caddo Parish School Board*, 735 F.2d 923, 936-937 (5th Cir. 1984) (en banc) (holding that all four factors militated against timeliness and giving no decisive weight to any single factor). It likewise does not appear that any of the four other courts of appeals has assigned any controlling weight to this additional factor, or that it has proven to be decisive in many cases.[12] The identification of this additional

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[12] The *Stallworth* "four-factor" formulation has been announced, with some qualification, in the following four Circuits:

First: *Caterino* v. *Barry*, 922 F.2d 37, 40-43 (1st Cir. 1990) (all four factors disfavor timeliness); *Fiandaca* v. *Cunning-*

factor by some courts of appeals therefore does not present the sort of concrete circuit conflict that warrants resolution by this Court.

Even if we assume, however, that the issue petitioner raises might warrant review at some time, this is not the appropriate case. Petitioner did not request the Ninth Circuit panel to consider the additional factor it now says is critical to the timeliness determination; it instead contended that it satisfied the three-factor test for timeliness of intervention under the Ninth Circuit's decision on a prior appeal in this case, *United States* v. *Oregon*, 745 F.2d at

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ham, 827 F.2d 825, 834-835 (1st Cir. 1987) (all four factors favor timeliness); *Culbreath* v. *Dukakis*, 630 F.2d 15, 20 (1st Cir. 1980) (all four factors disfavor timeliness).

Second: *Farmland Dairies* v. *New York State Dep't of Agric.*, 847 F.2d 1038, 1043-1044 (2d Cir. 1988) (four factors are not exhaustive but are "guide[s]" in assessing totality of circumstances as to timeliness; factors disfavor timeliness).

Seventh: *City of Bloomington* v. *Westinghouse Elec. Corp.*, 824 F.2d 531, 534-537 (7th Cir. 1987) (all four factors disfavor timeliness); *United States* v. *Kemper Money Mkt. Fund*, 704 F.2d 389, 391 (7th Cir. 1983) (factors favor timeliness); but cf. *United States* v. *City of Chicago*, 897 F.2d 243 (7th Cir. 1990) (intervention request for leave to appeal an anti-discrimination case settled by original parties held untimely; four factors not discussed).

Eleventh: *Walker* v. *Jim Dandy Co.*, 747 F.2d 1360, 1364, 1366 (11th Cir. 1984) (district court instructed to consider several factors, including prejudice to applicant, with no mention of relative weight to be given each factor); *United States* v. *Jefferson County*, 720 F.2d 1511, 1517-1519 (11th Cir. 1983) (all four factors disfavor timeliness; prejudice to the would-be intervenor, is not "sufficient" to give it weight where the applicant "could not be bound" by the judgment (see *Martin* v. *Wilks*, *supra*) or where the applicant's interests are "adequately represented" by an existing party, 720 F.2d at 1517).

552. See Pet. C.A. Br. 28-34; Pet. C.A. Reply Br. 15-22. And although petitioner filed a suggestion of rehearing en banc, it did not request the en banc Ninth Circuit to overrule circuit precedent and adopt a four-factor test; to the contrary, petitioner once again endorsed the three-factor test applied in *United States* v. *Oregon* and by the panel below. Pet. C.A. Reh'g Pet. 5. This Court has traditionally declined to consider issues that were neither raised nor decided below, and there is no reason to depart from that practice in this case.

Here, the district court considered *all* factors governing intervention, not just timeliness. As a result, it considered whether petitioner's interest was such that "the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest," Fed. R. Civ. P. 24(a)(2); see Pet. App. C20-C31, and found that petitioner would not be prejudiced if intervention was denied. *Id.* at C28-C29, C35. The district court held that petitioner's interests in its ocean fishery were only indirectly affected, *id.* at C26-C27, C30-C31, that petitioner had other remedies under the Magnuson Act, *id.* at C27-C28, and that challenges to those or other determinations "as to regulation of anadromous fish within the Columbia River" might be presented to the court "after all other remedies have been exhausted." *Id.* at C30. Accordingly, specific consideration of possible prejudice to petitioner's interests would have had no bearing on the finding by both courts below that its motion to intervene was untimely. Moreover, if petitioner had argued to the Ninth Circuit that possible prejudice to its interests should be considered on the threshold question of timeliness, the panel or en banc court would have had a record on which to address that question. Petitioner should not be permitted to

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bypass orderly appellate processes by presenting that argument for the first time in this Court.

3. As the district court concluded (Pet. App. C30), since petitioner's ocean fishery is subject to an entirely different regulatory regime under the Magnuson Act, petitioner should advance its interests in separate proceedings under that Act. The management of ocean chinook salmon fisheries off the Washington coast, an important component of petitioner's treaty fishery, is governed by the 1984 "Framework Amendment" to the Fishery Management Plan, as amended. 50 C.F.R. Pt. 661. Annual pre-season management specifications under the Framework Amendment process are formulated between March and May of each year. 50 C.F.R. Pt. 661, App. II.A. Public hearings conducted by the Pacific Fishery Management Council assure input by the public, including petitioner. Additionally, in a series of meetings, the PFMC prepares its recommended management specifications for action by the Secretary of Commerce. See, *e.g.*, Notice of 1990 Fishery Management Measures and Request for Comments, 55 Fed. Reg. 18,894, 18,895 (May 7, 1990). Section 302(i) of the Magnuson Act, 16 U.S.C. 1852(i), requires such PFMC meetings and PFMC committee meetings to be public, except for meetings pertaining to national security, employment matters, or briefings on litigation.

Nevertheless, petitioner contends (Pet. 38, 55) that relief under the Magnuson Act is barred by another decision of the court of appeals, *Makah Indian Tribe* v. *Verity*, 910 F.2d 555 (9th Cir. 1990) (discussed in note 5, *supra*). *Verity* in no way curtails petitioner's rights under the administrative procedures just described. Nor does it foreclose all judicial relief.

In *Verity*, petitioner sued the Secretary of Commerce challenging limits to ocean fishing quotas for the 1987 season. Both the district court and the court of appeals held that what petitioner was actually seeking was a favorable reallocation of the 1987 fish harvest theretofore allocated to other Indian treaty fisheries of other tribes. 910 F.2d at 557, 559. The court of appeals concluded that the absent tribes were indispensable parties to such an adjudication, and that because of tribal sovereign immunity they could not be joined without their consent; accordingly, the portion of the case seeking reallocation of the Indian treaty harvest was dismissed. *Id.* at 557, 560. However, the Ninth Circuit reinstated the claims of petitioner that sought prospective relief concerning alleged defects in the administrative procedures followed by the Commerce Department in adopting Magnuson Act regulations. It thus is a considerable overstatement for petitioner to claim (Pet. 55) that *Verity* bars any "separate action to challenge the results of * * * the * * * ocean management process" under the Magnuson Act. And even if *Verity* had done so, petitioner chose not to seek immediate review of the interlocutory decision in that case, and there will be time enough for petitioner to seek further review in *Verity* (or to seek other relief) following the proceedings on remand.

Finally, whatever disadvantage *Verity* may present for petitioner results not from any proceedings in this case, but from the independent bar of sovereign immunity, which protects petitioner and other Indian tribes from unconsented suits to adjudicate their rights in fisheries and other natural resources. The invocation of sovereign immunity in *Verity* should not serve as a justification for petitioner to

obtain certiorari or intervention in this separate case. *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986); *Lomayaktewa* v. *Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975), cert. denied, 425 U.S. 903 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1990

MAKAH INDIAN TRIBE

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF OF RESPONDENTS COLUMBIA RIVER TRIBES IN OPPOSITION, TO PETITION FOR WRIT OF CERTIORARI

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I. Review Should be Denied Because There is no Conflict Among the Circuits Over the Issue of Whether Prejudice to Applicants for Intervention Under Fed. R. Civ. P. 24 is a Factor that Must be Considered in Every Analysis of Timeliness.

a. The law regarding the timeliness of the petition for intervention is well established.

"Timeliness" for purposes of Rule 24 "is not a word of exactitude or of precisely measurable dimensions." *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1971); *See, Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977). "Rule 24 fails to define it, and the Advisory Committee Note furnishes no clarification." 558 F.2d at 263. "Since the requirement of timeliness is a flexible one, much must necessarily be left to the sound discretion of the court, and the trial judge's decision on the question will be reviewed only for an abuse of discretion." 7C Wright, Miller, Kane, *Federal Practice and Procedure*, Section 1916, p. 435 (1986). *See also*, 3B Moore's *Federal Practice*, Section 24-13, pp. 24, 151-153 (1990).

The applicable standards for the consideration of timeliness under Rule 24 were announced by this Court in *NAACP v. New York*, 413 U.S. 345 (1973).

> If it is untimely, intervention must be denied. Thus, the court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. *Timeliness is to be determined from all the circumstances.* And it is to be determined by the court in the exercise of its sound discretion; unless that discretion is abused, the court's ruling will not be disturbed on review.

Id. at 365-366 (footnotes omitted) (emphasis added).

This Court in *NAACP* then examined four factors to determine whether the motion to intervene was timely: (1) The length of time the petitioner knew or should have known of the pendency of the suit; (2) the promptness with which the petitioner acted once aware of the suit; (3) any unusual circumstances warranting intervention; and (4) any unusual circumstances mitigating against intervention. *See, Culbreath v. Dukakis*, 630 F.2d 15, 20 n.9 (1st Cir. 1980) (First Circuit describes the timeliness factors set out in *NAACP*).

The key to the test announced in *NAACP*, is "all circumstances." The factors this Court identified and considered in *NAACP* in determining timeliness clearly anticipate examination of the broadest range of circumstances both for and against intervention, in addition to the two specific considerations. Many factors have been identified and considered by courts in weighing the matter of timeliness under Rule 24 since this Court's decision in *NAACP*, including, for example:

– The amount of time that has elapsed since the suit was initiated or the stage to which the suit has progressed, *e.g., Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978), *cert. denied*, 413 U.S. 837 (1978).

– The amount of time during which the applicant knew that his interests were not protected in the suit, *e.g., United Airlines v. McDonald*, 432 U.S. 385, 394 (1977).

– Whether the applicant claims a right to intervene or merely seeks permission to intervene, *e.g., EEOC v. United Air Lines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975).

– The interests of the applicant, *Romasanta v. United Airlines, Inc.*, 537 F.2d 915, 918 (7th Cir. 1976), *aff'd sub nom. United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).

– The extent of prejudice to the applicant should intervention be denied, *Stallworth v. Monsanto Co., supra,* at 265-66.

– Whether the applicant seeks to relitigate issues already decided, *Liddell v. Caldwell*, 546 F.2d 768, 770 (8th Cir. 1976), *cert. denied*, 433 U.S. 914 (1977).

– Prejudice to existing parties that would result from the intervention, *Stotts v. Memphis Fire Department*, 679 F.2d 579, 584-85 (6th Cir. 1982).

– Prejudice to existing parties resulting from the delay of the applicant in intervening, *Stallworth v. Monsanto Co., supra,* at 265.

– Disruption of the orderly processes of the court, *e.g., United States v. Allegheny-Ludlum Industries, Inc.*, 553 F.2d 451, 453 (5th Cir. 1977).

While this list is not exhaustive, it illustrates some of the most common considerations and the possible scope of factors that have a bearing upon the timeliness issue.

b. Flexibility in tests established by courts is necessary to allow consideration of "all circumstances" involved in the timeliness issue.

Some courts have approached and decided the timeliness issue without enumerating criteria to be considered. See, *United States v. Yonkers Board of Education*, 801 F.2d 593 (2d Cir. 1986); *National Wildlife Federation v. Burford*,

878 F.2d 422 (D.C. Cir. 1989). However, most courts have announced factors that they deem worthy of primary consideration in determining timeliness. In doing so, they have generally maintained the flexibility required to examine "all circumstances" relevant to the petition before them consistent with this Court's direction in *NAACP*.

Different courts have chosen specific factors which they consider "particularly probative" in resolving the timeliness issue, *see, e.g., Stotts v. Memphis Fire Department*, 679 F.2d 579, 582 (6th Cir. 1982), and it has been recognized that courts must be "guided primarily by practical considerations," *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), citing Fed. R. Civ. P. 24(a)(2) advisory committee note. In identifying those factors to be considered, neither the subject nor the number have been generally consistent. However, these decisions universally cite *NAACP* as establishing the requirement that "all circumstances" be examined.

In *Stotts v. Memphis Fire Department, supra*, the court identified the five factors which were "particularly probative" as follows: (1) The purpose for which intervention was sought; (2) the length of time preceding the application for intervention during which the applicant knew or reasonably should have known of his interest in the case; (3) prejudice to original parties; (4) the existence of unusual circumstances militating against or in favor of intervention; and (5) the point to which the suit has progressed. *Id.* at 582.

The three factors identified for consideration in *Nevilles v. EEOC*, 511 F.2d 303 (8th Cir. 1975) were: (1) How

far the proceedings had gone when the movant sought to intervene; (2) prejudice to existing parties; and (3) the reason for the delay in intervention. *Id.* at 305.

A variation of those criteria is found in *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir. 1978) wherein the relevant circumstances were identified as: (1) The stage of the proceeding; (2) prejudice to other parties; and (3) the reason for and the length of the delay. *Id.* at 659.

In *Stallworth v. Monsanto Co., supra*, a key case in Makah's argument that the circuits are in conflict, the factors specified by the Fifth Circuit were: (1) The length of time the applicant knew or should have known of his interest in the case before the petition was filed; (2) the prejudice to existing parties; (3) the extent of the prejudice the applicant would suffer if his petition for leave to intervene is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. 558 F.2d at 264-66.

While the factors identified by these courts as relevant to the timeliness issue are generally different, none of them are inconsistent with this Court's direction in *NAACP*. They have all been shaped to allow the flexibility required in examining "all circumstances" involved in the issue of timeliness.

c. Prejudice to the applicant for intervention is not a mandatory part of the timeliness test in any circuit.

As noted above and in Makah's argument, some of the courts have included the factor of prejudice to the

applicant as one criteria in determining timeliness. However, contrary to Makah's claim that a conflict exists among the circuits, that factor has never been established as mandatory among those circuits that include it in their test, thus leaving the key factors for resolving timeliness consistent throughout the circuits and consistent with the directives from this Court.

From the very outset, prejudice to the applicant has not been considered an essential part of the timeliness test. In the case that apparently first included "prejudice to the applicant" as a criteria in its list of factors, that very factor was *ignored* by the court in its analysis. In *Stallworth v. Monsanto Co., supra,* the Fifth Circuit listed "four factors that must be considered in passing on the timeliness of a petition for leave to intervene." 558 F.2d at 264. As noted above these were: (1) the length of time the applicant knew or should have know of his interest in the case before petitioning for intervention; (2) the prejudice to existing parties; (3) the prejudice to the applicant; and (4) any unusual circumstances militating either for or against a determination of timeliness.

After applying factors 1, 2 and 4 to the record before it, the *Stallworth* court concluded, "In view of the circumstance that Factors 1, 2, and 4 militate strongly in favor of a finding of timeliness, *it is not necessary for us to consider in this context the extent to which the appellants might be prejudiced if their motion were denied." Id.* at 267 (emphasis added).[1]

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[1] The *Stallworth* decision states that all four factors "must" be considered in passing on timeliness. Apparently only one

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This pattern of considering two or three factors and disregarding that of prejudice to the applicant is uniformly followed in subsequent cases including, significantly, cases from those circuits that Makah claims include it as part of the test for timeliness. *Kneeland v. National Collegiate Athletic Ass'n.*, 806 F.2d 1285 (5th Cir. 1987); *United States v. LeFevor*, 798 F.2d 977 (7th Cir. 1986); *United States v. Jefferson County*, 720 F.2d 1511 (11th Cir. 1983); *United States v. City of Chicago*, 796 F.2d 205 (7th Cir. 1986); *Corely v. Jackson Police Department*, 755 F.2d 1207 (5th Cir. 1985); *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980).

The disregard of this factor might be attributed to the failure of the parties to raise the issue before the trial court. *See, for example, Narragansett Indian Tribe v. Ribo, Inc.*, 868 F.2d 5 (1st Cir. 1989). However, that is rarely the case. It is clear, even in cases where prejudice to the applicant is claimed and argued, that other factors in the timeliness test are given more weight. *Serra v. United States General Services Administration*, 847 F.2d 1038, 1044-45 (2d Cir. 1988); *United States v. Jefferson County*, 720 F.2d 1511, 1519 (11th Cir. 1983). In *Corely v. Jackson Police Department, supra*, after restating and applying parts 1, 2 and 4 of the test set out in its earlier decision in *Stallworth*, the Fifth Circuit stated that, "In light of the

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circuit court has ever taken that language literally and remanded a case on the grounds that the district court failed to consider the factor of prejudice to the applicant for intervention in its analysis of timeliness. *Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1365-66 (11th Cir. 1984).

foregoing, *Stallworth*'s third factor, involving prejudice to the intervenor, could not bring sufficient weight to bear to offset the other factors and carry the timeliness issue for the appellant." 755 F.2d at 1210.

The Second Circuit in *United States v. Yonkers Board of Education*, 801 F.2d 593 (2d Cir. 1986), stated that in weighing the harm to late intervenors against harm to existing parties, " . . . it does not strike us as unjust that intervention on the part of late-arrivers must yield to all the circumstances herein." *Id.* at 596. *See also, Serra v. United States General Services Administration, supra,* at 1044-45. This is consistent with the established rule that the single most important consideration in determining the timeliness of intervention is the prejudice to the existing parties to the case. 7C Wright, Miller, Kane, *Federal Practice and Procedure*, Section 1916, p. 435 (1986); *United States Postal Service v. Brennan*, 579 F.2d 188 (2d Cir. 1978); *Davis v. Board of School Commissioners of Mobile Co.*, 517 F.2d 1044 (5th Cir. 1975).

Since it was first established as a factor in the timeliness test, there have been relatively few courts that have expressly evaluated the prejudice to applicant factor. Those that have done so either criticize it or define its role in very limited terms.

Judge Aldrich of the First Circuit, in a concurring opinion in *Culbreath v. Dukakis, supra,* directed his attention to it. In voicing his disagreement with its inclusion as a factor in evaluating timeliness, he stated:

> Without discussing it in detail, I think there is over-concern with the question of possible harm to appellants. Passing the question of how we are able to determine the merits of applicants' case when they have not been allowed to

> present it, I do not believe we should have to do so. There should be two principal issues – was there a substantial, unexcused delay after appellants knew, or should have known, of an interest and right to seek to intervene, and are the parties seriously prejudiced by the delay, viz., to what extent would they be worse off by intervention when sought, as distinguished from when it reasonably could have been sought? If the unexcused delay would cause substantial prejudice to the parties, appellants should bear the loss, as any other defaulting party. I would view prejudice to them only as part of a claim of unusual circumstances, *NAACP v. New York*, 1973, 413 U.S. 345, 368, 93 S.Ct. 2591, 37 L.Ed.2d 648 – not here possible – and not something to be considered in the ordinary course.

630 F.2d at 25.

In *United States v. Jefferson County, supra,* the Eleventh Circuit considered the prejudice to the applicant factor as announced by the Fifth Circuit in *Stallworth v. Monsanto Co., supra,* and concluded that it had relevance in only two situations:

> We note that this third factor thus has weight only in the situation where (a) the judge cannot anticipate the extent to which a final judgment will bind the movant, or (b) the judge finds that although the movant has an identical interest with a party, he has a sufficiently greater stake than the party and that the party's representation may be inadequate to protect the movant's interest. Otherwise, where the movant has no identity of interest with a party and thus could not be bound, or where his interest is identical with a party and consequently he is adequately represented, we would find no prejudice sufficient to give weight to the third factor.

720 F.2d at 1517.

Among the circuits that have adopted the test first defined by the Fifth Circuit in *Stallworth*, there is consensus with regard to the prejudice to applicants factor that *"Stallworth* is not an algorithm, but a framework for analysis." *Lelsz v. Kavanaugh*, 710 F.2d 1040, 1043 (5th Cir. 1983); *Corely v. Jackson Police Department*, 755 F.2d at 1209.

d. Conclusion.

It is significant that none of the major authorities on federal practice and procedure note the conflict among circuits claimed by Makah. Makah's entire argument hinges upon the assertion that in the First, Second, Fifth, Seventh, Eleventh and D.C. Circuits, the factor of prejudice to applicants for intervention is a *mandatory* consideration in the analysis of timeliness. However, that is clearly not the case. Even in the circuits where it is considered, the prejudice to applicants factor is relegated to a relatively minor role. Rather, the circuits are consistent in giving primary consideration to the prejudice intervention would have upon the existing parties and the duration and reason for the delay in intervention with due consideration given to "all circumstances" as directed by this Court in *NAACP*. Accordingly, review should be denied on the issue of the Ninth Circuit's failure to consider prejudice to Makah in analyzing the timeliness of Makah's application for intervention.

II. Review Should be Denied Because the Ninth Circuit Properly Analyzed the Role of Prejudice to Existing Parties in Determining the Timeliness of Makah's Application for Intervention.

Consideration of prejudice to existing parties is a well-established part of the Ninth Circuit's timeliness

analysis. *Alaniz v. Tillie Lewis Foods, supra* at 659; *Petrol Stops Northwest v. Continental Oil Company*, 647 F.2d 1005, 1009-1010 (9th Cir. 1981); *Shelter Framing Corp. v. Pension Benefit Guarantee Corporation*, 705 F.2d 1502, 1508 (9th Cir. 1983); *Aleut Corp. v. Tyonek Native Corp.*, 725 F.2d 527, 530 (9th Cir. 1984); *United States v. Oregon*, 745 F.2d 550, 552-553 (9th Cir. 1984).

The Ninth Circuit's analysis of prejudice to existing parties is not in conflict with other circuits. *See, Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 506 (3d Cir. 1976), *cert. denied*, 426 U.S. 921 (1976); *McClain v. Wagner Electric Co-op*, 550 F.2d 1115, 1120 (8th Cir. 1977).

The Ninth Circuit opinion in this case acknowledged that prejudice to existing parties is an important part of the timeliness analysis. "One of the 'most important' factors in determining timeliness is prejudice to the existing parties. *United States v. Oregon*, 745 F.2d at 552." *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir. 1990) (citing an earlier Ninth Circuit decision in this case concerning Idaho's intervention).

The only basis Makah has for seeking certiorari on this issue is its claim that the Ninth Circuit opinion, after correctly stating the law with respect to prejudice to existing parties, failed to thoroughly analyze and discuss the issue. In short, Makah's sole complaint is one of insufficient emphasis rather than legal error. Review should be granted, according to Makah, because the Ninth Circuit "gave only *cursory treatment* to the issue of prejudice to the existing parties." Petitioner's Br. at 42 (emphasis added).[2]

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[2] Makah's criticism of the Ninth Circuit's depth of analysis on the prejudice issue is especially unwarranted in light of the

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Besides falling far short of the standards for Supreme Court review, Makah's criticism of the Ninth Circuit opinion is misplaced. Not only did the Ninth Circuit correctly state the law on this issue, it also properly applied it to the facts of this case. The prejudice to existing parties in this case stems from the fact the Makah intervention would lead to proposed modifications to the existing parties' Columbia River Fish Management Plan (Plan), and perhaps lead to the destruction of the Plan.

It is clear from Makah's Petition for Writ of Certiorari, just as it was clear to the district court and the Ninth Circuit, that Makah is interested in more than becoming a party to the *case*. What Makah really wants is to become a party to the *Plan*. Makah assumes that if it becomes a party to the case, it will become a party to the Plan. "Makah's participation in future, annual negotiations to *implement the plan* cannot now jeopardize the existence of the plan itself." Petitioner's Br. at 48 (emphasis added). Makah's intent is also shown by its assertion that there would be no prejudice to other parties "from permitting Makah to participate in *future proceedings under the plan* negotiated by the existing parties and approved by the court." Petitioner's Br. at 47-48 (emphasis partly added and partly in original). *See also*, Makah's Complaint in Intervention. Petitioner's Br. at 18 n.15.

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abuse of discretion standard of appellate review applicable to the issue.

In fact, Makah's intervention in the case would not automatically make it a party to the Plan. Moreover, only parties to the Plan can participate in negotiations and processes under the Plan.[3] After intervention, Makah would stand in the position of being a party to the case yet outside the Plan and its processes. Of course, once it is a party to the case, Makah would then seek to modify the Plan to become a full participant. Assuming Makah is successful, that action alone would change the Plan by widening its geographic scope.[4] Makah might also seek changes in the Plan to accommodate its interests and preferences for how the Plan should work. These proposed changes presumably would reflect the objections to the Plan that Makah raised in the Plan-approval proceeding in the district court. *See, United States v. Oregon*, 699 F. Supp. 1456, 1468-69 (D. Or. 1988) (Amended Opinion re: Plan); *United States v. Oregon*, 122 F.R.D. 571 (D. Or. 1988) (Amended Opinion re: Intervention).

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[3] Although Idaho and the Shoshone-Bannock Tribes did not sign the Plan, Idaho "is considered a party by [the Plan's] terms," *United States v. Oregon*, 699 F. Supp. 1456, 1460 (D. Or. 1988), and the Shoshone-Bannock Tribes were made a party by amendments to the Plan ordered by the district court. *Id.* at 1465. The Colville Tribes became a party to the case after the Plan was approved for the sole purpose of determining whether some or all of Colville's tribal members have treaty fishing rights under the Yakima and Nez Perce treaties. Colville is not a party to the Plan.

[4] The Plan does not apply to "entities not party to this agreement." Plan, Section I.B.3 (CR 1490, Ex. A). As a party to the agreement, Makah and its ocean fisheries off the northwest corner of Washington's Olympic Peninsula would be subject to the Plan's provisions concerning harvest management and other matters.

It was Makah's professed desire to become a party to the *Plan* and to participate in future negotiations and proceedings under the *Plan*, that the district court and the Ninth Circuit found prejudicial to the existing parties in terms of Makah's admission to the case on an ongoing basis. *United States v. Oregon*, 122 F.R.D. at 575, 578, 579; *United States v. Oregon*, 913 F.2d at 588, 589. The district court felt, and the Ninth Circuit agreed, that adding a new party into the "complex and delicately balanced" Plan after four and a half years of negotiations, when the new party represented new geographical, biological and legal interests, with the expectation that the new party would demand that the Plan be adjusted to accommodate its interests, might very well upset the balance of concessions contained in the consent decree and perhaps destroy it.[5] As the district court explained:

> Each portion of the complex Plan reflects concessions made and relates to other portions of the Plan. To allow participation by the Makah Tribe [in the Plan] now would require the parties to start negotiating all over again. I find this would significantly prejudice the existing parties.

122 F.R.D. at 575. Later, in the portion of its opinion discussing permissive intervention, the district court further explained how Makah's intervention in the case would trigger a potentially fruitless attempt to renegotiate the Plan:

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[5] The Plan is self-terminating under several conditions, one of which is the withdrawal of a party or parties at any time for any reason after June 30, 1991. Plan, Section I.F.3 (CR 1490, Ex. A).

> . . . I note that the delay that might occur is not a delay in objecting and hearing objections to the 1988 Plan, but rather the delay would be in trying to reopen negotiations of the Plan. The Plan is a complex, sensitively balanced document that was derived following more than four years of negotiation. To renegotiate and allow the Makah Tribe complete participation would be a serious prejudice to the participating parties. Further, the Makah Tribe has not demonstrated anything to indicate such a renegotiation would be fruitful. Thus, I find to grant status as a permissive intervenor to the Makah Tribe would unduly delay the proffered implementation of the 1988 Plan and would prejudice the adjudication of the rights of the original parties.

122 F.R.D. at 579.

That is why the district court and the Ninth Circuit cited *County of Orange v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986), for the proposition that intervention that might cause the unraveling of a settlement agreement is "so prejudicial that to allow [intervention] at this late date would be tantamount to disaster." 913 F.2d at 589.

Although Makah's Petition ignores the difference between intervention in the *case* and becoming a party to the *Plan*, the district court and the Ninth Circuit did not. What the district court and the Ninth Circuit feared is that intervention in the case would lead to Makah demands for modifications in the Plan to accommodate Makah's asserted interests. The district court clearly had doubts whether the Plan could survive as a consent decree negotiated by the existing parties if Makah attempted to become a party to the Plan and assert its interests in future negotiations and proceedings under

the Plan. The Ninth Circuit adequately reviewed this aspect of the district court's ruling and correctly found no abuse of discretion. Accordingly, there is no basis for granting certiorari on the issue of the Ninth Circuit's analysis of prejudice to existing parties in determining the timeliness of Makah's application for intervention.

III. Review Should be Denied Because the Ninth Circuit's Decision in this Case is Not in Conflict with this Court's Decision in *Martin v. Wilks*.

The Ninth Circuit's decision in this case is not in conflict with this Court's decision in *Martin v Wilks*, 490 U.S. 755 (1989). This Court's decision in *Wilks* allowed plaintiffs to intervene despite previous litigation deciding the same issue because plaintiffs' rights were directly affected by that litigation and they had no other means of protecting their rights. These factors are not present in this case. Here, the interest that the Makah seeks to protect is indirect, and Makah has access to other forums in which that interest is directly protected.

In *Wilks*, an employer who had entered into a consent decree in a prior lawsuit which required the establishment of goals for promoting black employees was sued by another group of employees who claimed that the employer's reliance upon the terms of the consent decree in promoting black employees violated their rights to be protected against racial discrimination. The *Wilks* defendants, including several black employees who were parties to the previous action, sought to have the plaintiffs' case dismissed on the grounds that plaintiffs could have

intervened in the previous case but failed to do so. Therefore, defendants argued that plaintiffs were precluded from collaterally challenging the consent decree in this action under the "impermissible collateral attack" doctrine.

This Court rejected the defendants' argument that the impermissible collateral attack doctrine precluded plaintiffs' challenge to the employer's actions. This Court noted that, generally, a person's legal rights cannot be deprived in a proceeding to which a person is not a party. 490 U.S. at 763. This Court also noted that the Federal Rules of Civil Procedure (Rule 19 and Rule 24) generally provide for joinder and voluntary intervention and that the parties seeking a judgment binding on another must join that person but that person is not obligated to intervene. Based upon these general principles of jurisprudence, this Court went on to hold that the plaintiffs in *Wilks* could not be precluded from challenging in a separate proceeding the employer's actions under the consent decree that were alleged to constitute impermissible racial discrimination in violation of the federal constitution and statutes. 490 U.S. at 764.

Makah argues that the Ninth Circuit decision in this case is in conflict with this Court's decision in *Wilks*. Makah asserts that the Ninth Circuit's decision denying intervention as untimely "sacrificed Makah's ability, as a practical matter, to protect its fishing rights" in violation of the *Wilks* principle that a party's right to have "his own day in court" cannot be denied by a failure to intervene. Petitioner's Br. at 55. This contention is simply not true.

First, Makah's interest in the in-river allocation process, unlike that of the *Wilks* plaintiffs, is an indirect interest because its ocean fishery is not directly affected by the Plan. *United States v. Oregon*, 122 F.R.D. at 576-577. Second, there are judicial and administrative forums in which Makah, like every other party with an interest in the ocean fishery, can participate in order to protect its interests. *Id.* at 577; *United States v. Oregon*, 913 F.2d at 587. In contrast, the plaintiffs in *Wilks* had no other judicial forum in which to protect their interests.

This case involves a complex judicial and administrative scheme to regulate the harvest of Columbia River salmon and steelhead. *See*, 913 F.2d at 579. The harvest management and other provisions of the Plan do not directly affect the Makah's treaty fishing rights in the Pacific Ocean. Indeed, the Plan expressly disclaims any application to non-parties to the agreement. Plan, Section I.B.3 (CR 1490, Ex. A). Makah's interest in the processes and operation of the Plan is an indirect interest. *See*, 122 F.R.D. at 577. The Plan does not – nor was it intended to have – a binding effect on the Makah's interests in protection of its ocean treaty fishery. Although the Plan properly recognizes that ocean fishery management has an impact on the treaty fishing rights of the Columbia River tribes because fish caught in the ocean count for allocation purposes[6], and therefore there is a need for coordination between the in-river and ocean management agencies, the Plan does not precommit the Secretary of

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[6] The Columbia River tribes believe that the Plan requires the counting of only the non-Indian ocean catch. The state and federal parties to the Plan disagree.

Commerce to adopt specific ocean harvest quotas and does not limit the Secretary's regulatory authority over ocean fisheries. Ocean fishery management is constrained by federal law, treaty rights (both Makah's and those of the Columbia River tribes) and conservation necessity. The directly affected legal interest that was protected in the *Wilks* litigation is simply not present here.

Moreover, ocean fisheries off the coast of Oregon and Washington, including Makah's ocean fishery, are regulated by the federal government under the Fishery Conservation and Management Act of 1976 (FCMA), Pub.L. 94-265, 90 Stat. 331 (codified at 16 U.S.C. §1801 *et seq.*).[7] There are other forums, both judicial[8] and administrative,

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[7] The FCMA establishes an administrative process in which parties with interests in Pacific salmon fisheries within the United States' jurisdiction can participate in the management of the fisheries. The FCMA establishes the Pacific Fishery Management Council (PFMC), which is composed of representatives of the States of Washington, Oregon, California, and Idaho, one representative of the Indian tribes and the federal government. 16 U.S.C. §1852(a)(6). The PFMC develops a regional fishery management plan which must be consistent with applicable law, including Indian treaty rights, and must consider the regulations of coastal states. 16 U.S.C. §1853 (a)(1)(C); 50 C.F.R. §602.11(f)(3)(ii). After public meetings, the PFMC recommends yearly harvest rates to the Secretary of Commerce, who promulgates regulations detailing ocean fishing allotments. 16 U.S.C. §1854. The Secretary's regulations are subject to judicial review under the Administrative Procedures Act. 16 U.S.C. §1855(d); 5 U.S.C. §706(2).

[8] Makah's fisheries are also regulated by the State of Washington under on-going federal court supervision. *See, U.S.*

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in which Makah can and does participate to protect its interest in its ocean treaty fishery. Thus, unlike the situation facing the *Wilks* plaintiffs, the denial of Makah's intervention does not preclude Makah from protecting its ocean treaty fishing rights.

Unlike the potential preclusive effect of the consent decree on the plaintiffs in *Wilks*, the existing parties' Columbia River Fish Management Plan does not have a preclusive effect on Makah's ability to protect its interest in its ocean treaty fishery. The Ninth Circuit's holding therefore is not inconsistent with *Wilks*.

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v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert denied*, 423 U.S. 1086 (1976) (the forum for allocating fishing rights within the jurisdiction of the state of Washington, extending three miles out to sea, and which involves the Puget Sound and Washington Coastal treaty tribes, including Makah).

CONCLUSION

For the reasons stated above, Makah's Petition for Writ of Certiorari should be denied.

DATED this 6th day of June, 1991.

Respectfully submitted,

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NO. 90-1595

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MAKAH INDIAN TRIBE,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT STATE OF WASHINGTON'S BRIEF IN OPPOSITION

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BRIEF OF RESPONDENT, STATE OF WASHINGTON, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondent, State of Washington, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Ninth Circuit decision entered in this case on August 27, 1990. The Ninth Circuit opinion is reported at 913 F.2d 576 (Pet. App. A), the underlying opinion

(amended) of the district court for the District of Oregon is reported at 122 F.R.D. 571 (Pet. App. C).

STATEMENT OF THE CASE

Facts of the case are fairly presented in the opinions of the district court for the District of Oregon and the Ninth Circuit Court of Appeals (Pet. App. A and C respectively).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The petitioner endeavors to present issues which they did not raise with either the district court or the Ninth Circuit Court of Appeals.

In an effort to entice Supreme Court review, the petitioner, Makah Indian Tribe (hereinafter Makahs) have endeavored to create an issue which they did not raise with either the district court or the Ninth Circuit Court of Appeals. In their petition for Writ of

Certiorari, the Makahs contend that their "interest" in the case should have been explicitly considered as a part of the test for determining whether their motion to intervene was timely.

The district court's analysis of the timeliness element of Fed. R. Civ. P. 24(a) and the Ninth Circuit's review of the timeliness decision, focused on three factors: (1) the stage of the proceeding; (2) prejudice to the existing parties; and (3) the reason for and length of delay. 913 F.2d 576, 588-89 (Pet. App. A-48 through A-57). The Makahs now contend that the court's timeliness analysis should have explicitly addressed a fourth factor; that of the Makahs' interest in the case.

Generally the United States Supreme Court does not consider questions not

raised in the district court and the court of appeals. Ramsey v. United Mine Workers, 401 U.S. 302, 312 (1971); Neely v. Eby Construction Co., 386 U.S. 317, 330 (1967); Delta Airlines v. August, 450 U.S. 346, 362 (1981); Adickes v. Kress and Co., 398 U.S. 144, 147 n.2 (1970); United States v. Ortiz, 422 U.S. 891, 898 (1975).

In the case of United States v. Ortiz, 422 U.S. 891 (1975), the petitioner government claimed that the Ninth Circuit Court of Appeals erred in voiding an automobile search at a fixed checkpoint and consequently reversing a conviction for transporting illegal aliens. The Ninth Circuit's decision in Ortiz, was based on its earlier unreported case of United States v. Bowen, 500 F.2d 960 (CA 9 1974) wherein the court held for the first time that

probable cause was required for all vehicle searches near the border, whether conducted by roving patrols or at fixed checkpoints.

In its petition the government claimed error because the search had occurred before the decision in Bowen. The Supreme Court refused to consider this issue because it was raised for the first time in the government's Petition for Certiorari. The Ortiz court stated:

> Examination of the government's brief in the Ninth Circuit indicates that it did not raise this question below. On the contrary, it represented to the court that the decision in Bowen would be "determinative of the issues in this case." We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari.

United States v. Ortiz, 422 U.S. 891, 898 (1975).

The circumstances in the present case are similar to those in Bowen. For here, not only did the Makahs fail to argue for application of this "fourth factor" at either the district court or the Ninth Circuit, the Makahs in fact tendered to the court the very three-prong analysis they now condemn as being too narrow.

In their opening brief to the Ninth Circuit the Makahs stated:

> This court has adopted three criteria for determining timeliness: (1) state of the proceedings; (2) prejudice to other parties; and (3) reason for and length of delay.

(Brief of Appellant Makah Indian Tribe before the Ninth Circuit Court of Appeals, June 26, 1989, p. 28.) In their Ninth Circuit brief the Makahs limit themselves to arguing why, in their view, the district court had

misapplied the three-prong analysis. Nowhere in their brief do the Makahs argue that there is a fourth element or criteria which the court should have applied. The reply brief of the appellant Makah Indian Tribe before the Ninth Circuit Court of Appeals is similarly void of any argument or suggestion that a fourth criteria should have been applied in determining the timeliness of their motion to intervene. (Reply Brief of Appellant Makah Indian Tribe before the Ninth Circuit Court of Appeals, November 22, 1989.) The Makahs' Petition for Rehearing and suggestion of appropriateness of rehearing en banc likewise contains no allegation or argument that the district court erred by not explicitly considering this fourth factor. (Appellant Makah Indian Tribe's Petition

for Rehearing and suggestion of appropriateness of rehearing en banc before the Ninth Circuit, September 25, 1990.)

The Makahs are attempting to argue this issue for the first time on review. They should not be allowed to do so.

2. The Ninth Circuit correctly applied the prevailing standard in affirming the district court's decision that the Makahs' Motion to intervene was not timely.

In the case of NAACP v. New York, 413 U.S. 345 (1973), this Court confirmed that timeliness is a primary condition which must be satisfied prior to looking to the other elements of either rule 24(a) or 24(b). This Court there stated:

> [I]t is at once apparent, from the initial words of both rule 24(a) and rule 24(b), that the application must be "timely." If it is untimely, intervention must be denied. Thus, the court where the

> action is pending must first be satisfied as to timeliness.

NAACP v. New York, 413 U.S. 345, 367 (1973).

In NAACP v. New York, this court further held that timeliness is to be determined by the court in the exercise of its sound discretion from all of the circumstances, and unless that discretion was abused, the court's ruling on timeliness will not be disturbed on review. Id. at 367.

The court's holding in NAACP does not establish a fixed list of criteria or circumstances by which timeliness should be adjudged. On the contrary, the opinion clearly leaves it to the discretion of the district court judge to determine from the circumstances there relevant whether a motion to intervene is timely.

In the present case the district court carefully reviewed the relevant circumstances on the question of whether the Makahs' petition was timely. In the exercise of its sound discretion, the court "denied the Makah motion to intervene as untimely, prejudicial to the parties and inappropriate because the Makah fishery is directly regulated by the PFMC . . ." (Pet. App. A-47).

On review the Ninth Circuit reviewed the district court's analysis of each of the three elements in the test for timeliness; the very test advanced by the Makahs. Based on that review the Ninth Circuit concluded that the district court had not abused its discretion in finding the motion to intervene untimely and consequently affirmed that determination.

This Court's decision in NAACP v. New York directs the Ninth Circuit to employ precisely the process which it employed here. A touchstone of that process is appropriate deference to the determination of the district court in the sound exercise of its discretion. NAACP v. New York, 413 U.S. 345, 367. In the case of Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980), one of the cases cited by the Makahs, the court held that even though the district court had employed a less comprehensive test than the First Circuit Court would have employed (i.e., one that did not expressly consider prejudice to the petitioner), it did not abuse its discretion in denying intervention as untimely. Id. at 24.

3. Even if the "Makahs' interest" were an essential criteria in evaluating the timeliness of the Makahs' motion to intervene, the district court did consider the Makahs' interest in reaching its decision.

The district court devoted considerable attention and nearly 10 pages of its amended opinion to an evaluation of the interest of the Makah Tribe. (Pet. App. C-20 through C-29.) In evaluating the Makahs' interest, the court noted that such evaluation of the applicant's interest is:

> [B]asically a threshold test because the criteria of practical harm to the applicant and the adequacy of representation by others are better suited to the task of limiting extension of the right to intervene.

(Pet. App. C-20.)

After carefully reviewing the interest of the Makah Tribe, the district court concluded:

> Thus, I find that the interest the Makah Tribe seeks to

> protect is the indirect effect of this court's actions. When I consider that interest in light of the scope of this action, the treaty fishing rights on the Columbia River, I must find that the interest to the Makah Tribe in this action does not pass the threshold test.

(Pet. App. C-29.)

Furthermore the district court went further and evaluated the Makahs' motion under Fed. R. Civ. P. 24 as if it were timely filed. Although the Ninth Circuit did not find it necessary to fully review this analysis, the district court fully and carefully analyzed the Makahs' motion to intervene as if it had been timely filed. (Pet. App. C-20 through C-36 and passim.) The district court concluded that even if the motion had been timely, the Makahs could not satisfy the other requisites for

intervention. (Pet. App. C-20 through C-36.)

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(5)

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IN THE

Supreme Court of the United States

October Term, 1990

MAKAH INDIAN TRIBE,

Petitioner,

v.

THE UNITED STATES OF AMERICA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF MAKAH INDIAN TRIBE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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1. The Makah Tribe seeks to intervene in this case to participate in the in-river management process for Columbia River salmon runs. It does not seek to expand the case to address ocean management issues. Just as Idaho intervened to protect its interests in the management of migrating salmon while they are passing through the waters of Oregon and Washington, Makah seeks to protect its interests within the existing geographic scope of the case. The Tribe asks for nothing more than a level playing field, i.e., that it be permitted to participate along with other competing sovereigns in the management and allocation of a finite resource.

The district court held Makah intervention would have been timely in 1986, while the parties were negotiating a long-term management plan, but was untimely in early 1988, when the plan was made public

for the first time and submitted to the district court for approval as a consent decree. Pet. App. C19 (intervention would have been timely in 1986); A-11 (characterizing plan as a consent decree). The timeliness issue was the only issue addressed by the Ninth Circuit. Pet App. A57.

Respondents oppose certiorari on the ground that the district court held Makah did not satisfy other Rule 24(a)(2) requirements.[1] This is an attempt to divert attention from the timeliness issue. The district court's other holdings are subject to de novo review on appeal. Pet. App. A47. That has not yet occurred. Speculation

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[1] No one defends the district court's holding that Makah is adequately represented by the existing parties. The Columbia River tribes recognize (and base much of their argument on the fact) that Makah has "geographical, biological and legal interests" that are currently unrepresented in the case. Joint Tr. Br. at 14.

about how the Ninth Circuit will rule on those issues when it reaches them offers no basis for denying certiorari. See Martin v. Wilks, 490 U.S. 755, 769 (1989).

2. Respondents assert that one of the three questions presented in Makah's petition -- whether the applicant's interest must be considered in determining timeliness under Rule 24 -- was not presented below. U.S. Br. at 18-19; Wash. Br. at 2-8. Accordingly, they suggest the Ninth Circuit did not "have a record on which to address that question." U.S. Br. at 19. These claims are in error.

In moving to intervene, Makah argued that it had important, legally protected interests in this case and that it would be prejudiced severely were it denied intervention. Dist. Ct. Br. at 5-8; Dist. Ct. Reply Br. at 3-17. These issues were briefed by all parties and detailed

affidavits were filed. Makah specifically argued that the timeliness requirement should be treated leniently because of the likelihood of serious harm to its interests. Dist. Ct. Br. at 9; Dist. Ct. Reply Br. at 17.

Makah sought de novo review of the district court's rulings on interest and impairment in the Ninth Circuit, and the issues were briefed by all parties. Makah again argued that the timeliness requirement should be relaxed because of the likelihood of serious harm to its interests. Ct. App. Br. at 28. Moreover, the Tribe contended that all Rule 24 requirements (including timeliness) should be applied in light of the practical effect of the case on the applicant. Id. at 27-28. Makah did not waive these arguments by also arguing that it satisfied the Ninth Circuit's three-part test, particularly since the district court

and the Ninth Circuit panel were each bound by that test as the law of the circuit. E.g. Charleston v. United States, 444 F.2d 504, 506 (9th Cir.), cert. denied, 404 U.S. 916 (1971).[2]

The Ninth Circuit failed to address the issue of prejudice to Makah not because of any defect in the record or because Makah failed to raise the issue, but because of its adherence to the circuit's three-part timeliness test. Pet. App. A48-57. Makah's Petition for Rehearing (at 14-15) again asked the court to consider the interests of absent parties in determining timeliness:

> [I]n the context of ongoing natural resources litigation, the practical importance of the right to intervene cannot be overstated. Where such litigation continues indefinitely, due process would seem to require that non-parties with an interest in the case, who are not represented by the existing

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[2] As shown by this Court's grant of certiorari in Lee v. Weisman, No. 90-1014, litigants need not brief issues that are foreclosed in the lower courts.

> parties, have the ability to intervene in future proceedings. Yet this court adopts a rule which permanently freezes all non-parties out of a forum that has the continuing power to make crucial decisions concerning public rights, solely because they did not participate in the past.

Makah argued at every stage that the impairment of its interests is an important factor in the Rule 24 timeliness analysis. There is a complete record on that issue. The question whether the Ninth Circuit erred by making the timeliness issues dispositive, and then completely ignoring Makah's interests in its review of the timeliness question, is squarely presented for review by this Court.

3. The Columbia River tribes contend there is no circuit conflict over the issue whether prejudice to the applicant must be considered in the timeliness analysis. Joint Tr. Br. at 1. The United States, however, implicitly concedes that a conflict exists. U.S. Br. at 17-18.

a. As noted in our petition (at 29-30) and acknowledged by respondents, at least five circuits require district courts to consider formally prejudice to the applicant as part of a four-part timeliness analysis.[3] Failure to do so was reversible error in at least four cases,[4] belying the assertion that prejudice to the applicant is

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[3] These include the First, Second, Fifth, Seventh and Eleventh Circuits. Although the Tenth and D.C. Circuits have not adopted a formal test, they typically balance the interests of the applicant against the interests of the existing parties in evaluating timeliness. See, e.g., Sanguine Ltd. v. United States Dept. of Interior, 736 F.2d 1416, 1419 (10th Cir. 1984); Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. Cir. 1972).

[4] Fiandaca v. Cunningham, 827 F.2d 825, 835 (1st Cir. 1987); Walker v. Jim Dandy Co., 747 F.2d 1360, 1365-66 (11th Cir. 1984); United States v. Kemper Money Mkt. Fund, 704 F.2d 389, 392 (7th Cir. 1983); Hodgson v. United Mine Workers, 473 F.2d 118, 129 (D.C. Cir. 1972). See also Sanguine Ltd. v. United States Dept. of Interior, 736 F.2d 1416, 1419 (10th Cir. 1984) (upholding intervention as timely where applicants will suffer prejudice if not allowed to intervene).

not a mandatory consideration in these circuits. In other cases, including those cited by respondents, these circuits gave the applicants' interests sensitive consideration, if not controlling weight, in determining timeliness.[5]

Makah does not contend that prejudice to the applicant is controlling, but simply that it must be considered in an essential balancing of interests. The three-part test applied by the Ninth Circuit, which gives no consideration to the applicant's interests, plainly conflicts with the four-part test

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[5] E.g. United States v. City of Chicago, 798 F.2d 969, 977 (7th Cir. 1986); United States v. Jefferson County, 720 F.2d 1511, 1516 (11th Cir. 1983); Culbreath v. Dukakis, 630 F.2d 15, 22-23 (1st Cir. 1980).

Respondents make much of the fact that in Stallworth v. Monsanto Co., 558 F.2d 257 (5th Cir. 1977), the court did not consider prejudice to the applicant. In that case, however, the other three factors supported a finding of timeliness, making it unnecessary for the court to consider the extent to which the applicant's interests would provide further support for such a finding.

adopted and followed in five circuits, and with the more informal balancing of interests typically undertaken in two others.

b. Contrary to the respondent tribes' suggestion, Joint Tr. Br. at 3-5, the Ninth Circuit's three-part analysis is flatly inconsistent with the directive in NAACP v. New York, 413 U.S. 345, 365-66 (1973), to examine "all the circumstances." This Court has always considered prejudice to the applicant to be a relevant circumstance.[6] The three-part test applied by the Ninth Circuit (as well as by the Third, Fourth and Eighth Circuits) precludes consideration of prejudice to the applicant and, rather than promoting "flexibility," stifles it.

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[6] See NAACP, 413 U.S. at 368-69; United Airlines v. McDonald, 432 U.S. 385, 395-96 and n. 16 (1977); Arizona v. California, 460 U.S. 605, 615 (1983).

c. The respondent tribes' suggestion that prejudice to the applicant is not and should not be an important consideration in evaluating timeliness is also inconsistent with Martin v. Wilks, 490 U.S. 755 (1989). The attempt to analogize the intervention applicant to a "defaulting party," Joint Tr. Br. at 9 (quoting Culbreath v. Dukakis, 630 F.2d at 25 (Aldrich, J., concurring)), disregards this Court's holding that a non-party has no duty to intervene when he acquires knowledge of a lawsuit; rather, the burden is on the existing parties to join him when such a step is indicated. 490 U.S. at 765. This allocation of responsibilities suggests that the interests of the applicant (who has violated no duty) should be given at least as much weight in the timeliness analysis as the interests of the existing parties (who did not meet their burden).

4. Respondents argue that, even if Makah's interests had been considered, the circuit court still would have affirmed the district court's timeliness holding because Makah is not "significantly" or "directly" affected by this case. U.S. Br. 15-16, 19, 20-21; Joint Tr. Br. at 18-20; Wash. Br. at 12-14.[7] However, the Ninth Circuit addressed none of the arguments now urged by respondents regarding the effect of this case on Makah. If this Court holds that an applicant's interests must be considered in the timeliness analysis, the case can be remanded to the circuit court to consider these arguments.

In Makah v. Verity, 910 F.2d 555, 557 (9th Cir. 1990), the same panel that decided

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[7] For Makah fishermen whose harvests and incomes are restricted, and for Makah elders who receive less fish for subsistence, in order to accommodate in-river escapement goals or harvest levels, the effects of this case are not "indirect" but very real.

this case found that the relationship between ocean and in-river allocations of finite salmon runs was so clear that in-river tribes (who have no treaty rights to fish in the ocean) would inevitably be prejudiced by the determination in their absence of an action involving ocean allocations. 910 F.2d at 560. If it were to consider the converse but parallel issue here -- namely, whether an ocean tribe is prejudiced by the determination in its absence of an action involving in-river allocations -- the Ninth Circuit would hardly accept the double standard urged by respondents and hold that there is no prejudice to the excluded ocean tribe.

Contrary to respondents' suggestions, there are no other forums in which Makah might protect its interests. Their suggestions are to:

-- participate in administrative

proceedings under the Magnuson Act (U.S. Br. at 20; Joint Tr. Br. at 19-20). Makah's ability to participate in the public portions of the PFMC process does not provide access to the confidential negotiations conducted under the consent decree in this case, which determine in-river management measures and heavily influence the public PFMC process. See Joint Tr. Br. at 13 ("only parties to the Plan can participate in negotiations and processes under the Plan"). Key members of the PFMC are active participants in those private negotiations, and all PFMC members attend private meetings to address this and other litigation. See U.S. Br. at 20.

-- seek judicial review of ocean regulations (U.S. Br. at 21; Joint Tr. Br. at 19). This approach has been unsuccessful. To the extent that allocation or management of Columbia River runs is in

issue, under Verity such a suit must be dismissed because the Columbia River tribes are indispensable parties.[8]

-- raise these issues in United States v. Washington (Joint Tr. Br. at 19 n. 8). When Makah attempted this, the United States argued and the district court agreed that allocation of Columbia River runs was outside the scope of the case and could only be considered in a proceeding in which the Columbia River tribes were parties.

-- intervene in this case in the future (U.S. Br. at 19). The decisions

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[8] Contrary to the United States' argument (Br. at 21-22), the prejudice to Makah is not simply a product of its inability to obtain judicial review of promulgated regulations. Even if judicial review were available, it is far less effective than the ability to participate in the critical processes that shape the regulations in the first place. E.g., Natural Resources Defense Council v. Costle, 561 F.2d 904, 909 (D.C. Cir. 1977). Thus, the real problem here is Makah's exclusion from this case, the forum for in-river management of Columbia River fisheries.

below would preclude this, and the respondent tribes would surely oppose it.

5. The Ninth Circuit's reliance on Makah's alleged delay and the possibility that intervention would upset the smooth operation of the consent decree conflicts with Martin v. Wilks.[9] No one claims this issue was not preserved. However, respondents contend there is no conflict because Makah is not bound by the consent decree (U.S. Br. at 16 n. 11), and has other forums in which to protect its interests (Joint Tr. Br. at 18-20).

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[9] Wilks was a major departure from the approach of virtually every circuit to the rights of third parties who are affected by consent decrees. Before it was decided, a combination of factors had "led to a series of decisions that make C [an affected third party] go away. C is always raising his claims in the wrong place or at the wrong time or in the wrong way." Laycock, "Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties," 1987 U. Chi. Legal F. 103, 153. As Makah's search for a forum makes clear, Wilks has not overcome the desire to make "C" go away.

a. The rule that nonconsenting parties are not bound by consent decrees was established before Wilks. E.g., Firefighters v. Cleveland, 478 U.S. 501, 529 (1986). The real issue in Wilks was whether such nonconsenting parties could be denied access to a forum in which to litigate their claims on the grounds that they had delayed seeking intervention in an existing case, and that they would upset a settlement agreement. This Court refused to deprive third parties of access to a court on these grounds. 490 U.S. at 763-65, 768.

b. Reliance on Makah's alleged delay in seeking intervention here, especially in light of the complex and evolving relationship between this case and ocean fisheries (Pet. at 10-15), is plainly at odds with Wilks. Because the "parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought

in the action," the burden is on them to bring in additional parties when such a step is indicated, rather than on the additional parties to intervene when they acquire knowledge of a lawsuit. 490 U.S. at 765. This is particularly true here since, as the district court noted (Pet. App. at C15), Makah was excluded from the consent decree negotiations.[10]

c. Reliance on possible interference with implementation of the consent decree is even more profoundly in conflict with Wilks. The relief Makah seeks here, intervention in on-going proceedings to implement a consent decree, is a far less

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[10] The district court's assertion that Makah offered no reason for its delay, Pet. App. at C19, is contradicted by the record. For example, Makah showed that the existing parties had made repeated statements that their negotiations would not affect ocean fisheries without first allowing Makah an opportunity to participate. E.g. Dist. Ct. Br. at 2-4, 9-10; Dist. Ct. Reply Br. at 17-18.

intrusive remedy than allowing (as this Court did in Wilks) nonconsenting parties to file an entirely new lawsuit that would override the substantive provisions of a consent decree.[11] In its brief to this Court in Wilks, the United States recognized that the same principles that defeat the collateral attack doctrine preclude a timeliness challenge under Rule 24:

> Rule 19 imposes a duty; Rule 24 creates only an opportunity. The plaintiff and the court should not be allowed to ignore their responsibilities under Rule 19, and then oppose intervention or subsequent litigation on grounds of timeliness.

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[11] The United States recognizes that Makah's participation in future proceedings will not upset the consent decree. U.S. Br. at 12-14; cf. Pet. at 47-48. In the lower courts Makah made clear that there were two distinct components to its proposed intervention -- opposition to the Plan and participation in future proceedings -- and analyzed each separately. E.g., Dist. Ct. Reply Br. at 18; Ct. App. Br. at 28-29. The lower courts' erroneous analysis of the effect of intervention in future proceedings cannot be excused by Makah's separate request to oppose the Plan.

Wilks, U.S. Br. at 20-21 n. 16 (quoting Laycock, supra, 1987 U. Chi. Legal F. at 142) (emphasis added).

In view of the explicit position advanced by the United States, and the strong opinion of this Court, the United States' current assertion that Wilks has "no relevance" here is remarkable. We recognize that the United States -- as an active litigant in a multitude of complex cases -- has strong interests in being able to enter into consent decrees and then shield those decrees from disruption by third parties. However, these concerns were thoroughly addressed in Wilks and are to be met by joinder under Rule 19, not by depriving an unjoined but affected third party of access to court.

d. Finally, even if (despite its experience to date) Makah were to obtain access to a forum to challenge in-river

management actions, it would seem far less prejudicial to respondents to permit Makah to participate in implementation of the consent decree in the first place. That has been the result in Wilks: the litigation has proceeded in the original case, where the white firefighters were allowed to intervene (despite a previous holding of untimeliness). From the perspective of protecting the interests of all parties and promoting the economical use of judicial resources, this would be the most sensible result here as well. In practice, it is the only result that will protect Makah's interests.

Respectfully submitted June 13, 1991.

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